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**TRANSCRIPT OF RECORD.**

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**Supreme Court of the United States**

**OCTOBER TERM, 1947**

**No. 431**

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**TIMOTEO MARIANO ANDRES, PETITIONER,**

**vs.**

**THE UNITED STATES OF AMERICA**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT.**

---

**PETITION FOR CERTIORARI FILED NOVEMBER 6, 1947.**

**CERTIORARI GRANTED DECEMBER 22, 1947.**

**No. 10815**

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

---

**TIMOTEO MARIANO ANDRES,**

**Appellant,**

**vs.**

**UNITED STATES OF AMERICA,**

**Appellee.**

---

**Transcript of Record**

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**Upon Appeal from the District Court of the United States  
for the Territory of Hawaii**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*United States of America*

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**NAMES AND ADDRESSES OF ATTORNEYS  
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For the Defendant Timoteo Mariano  
Andres. [1\*]

*Timoteo Mariano Andres vs.*

In the United States District Court for the  
Territory of Hawaii  
Criminal No. 9562

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

TIMOTEO MARIANO ANDRES,  
Defendant.

CLERK'S STATEMENT

Time of Commencing Suit:

December 17, 1943

Indictment filed

Names of Original Parties:

The United States of America, Plaintiff

Timoteo Mariano Andres, Defendant.

Dates of Filing Pleadings:

March 17, 1944. Motion for a New Trial filed.

March 24, 1944. Motion in Arrest of Judgment  
and to Stay Imposition of Sentence.

Dates When Proceedings Were Had:

December 17, 1943. Indictment filed.

December 20, 1943. Plea of Not Guilty, Bond  
fixed.

December 23, 1943. Continuance.

December 28, 1943. Appointment of Counsel.

February 28, 1944. Trial. [2]

February 29, 1944. Further Trial.

March 1, 1944. Further Trial.



*United States of America*

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March 2, 1944. Further Trial

March 3, 1944. Further Trial, Verdict.

March 6, 1944. Continuance.

March 10, 1944. Continuance.

March 17, 1944. Continuance.

March 24, 1944. Hearing on Motion for New Trial. Denied. Motion in Arrest of Judgment, and to Stay Imposition of Sentence. Submitted. Denied.

March 31, 1944. Sentence.

April 12, 1944. Hearing on Notice of Appeal.

July 27, 1944. Settlement of Record on Appeal.

Proceedings in the above entitled matter were had before the Honorable J. Frank McLaughlin, District Judge.

Dates of Filing Appeal Documents:

April 10, 1944. Notice of Appeal.

May 2, 1944. Extension of Time Within Which to Perfect Appeal.

July 21, 1944. Defendant-Appellant's Designation of Record.

July 26, 1944. Assignment of Errors.

CERTIFICATE OF CLERK AS TO THE  
ABOVE STATEMENT

United States of America,  
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the [3] foregoing to be a full, true and correct statement showing the time of commencement of the above entitled cause; the names



4 *Timoteo Mariano Andres vs.*

of the original parties; the several dates when respective pleadings were filed; the several dates when proceedings were had; the name of the Judge presiding and the dates when appeal documents were filed in the above entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 28th day of July, A. D. 1944.

[Seal]

WM. F. THOMPSON, JR.

Clerk, U. S. District Court,  
Territory of Hawaii. [4]

[Title of District Court and Cause.]

### INDICTMENT

18 U. S. C. 452; Criminal Code Section 273

[Filed]: Dec. 17, 1943 at 12 o'clock and 25 minutes p. m. Wm. F. Thompson, Jr., Clerk. By (s) Thos. P. Cummins, Deputy Clerk.

Returned by Grand Jury in open court December 17, 1943.

(s) WM. F. THOMPSON, JR.,  
Clerk.

I hereby order a Bench Warrant to issue forthwith on the within Indictment for the arrest of the defendant therein named, bail hereby being fixed at \$.....

.....  
Judge, United States District  
Court, Territory of Hawaii.

[5]

In the United States District Court for the  
Territory of Hawaii  
October Term 1943

The United States of America,  
District of Hawaii—ss.

The Grand Jurors of the United States empaneled sworn and charged at the Term aforesaid, on their oaths, present that: Timoteo Mariano Andres, hereinafter called the defendant, on or about the 23rd day of November, 1943, at Civilian Housing Area No. 3, Pearl Harbor, Island of Oahu, said Civilian Housing Area No. 3 being on lands reserved or acquired for the use of the United States of America and under the concurrent jurisdiction thereof, within the District of Hawaii and within the jurisdiction of this Court, did unlawfully, wilfully, feloniously and with deliberate premeditated malicious design and with malice aforethought, kill a human being, to wit: Carmen Gami Saguid, by stabbing and inflicting mortal wounds upon the body of the said Carmen Gami Saguid, thereby perpetrating the crime of murder in the first degree, contrary to law and to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

(S) G. D. CROZIER

United States Attorney  
District of Hawaii

A True Bill:

(S) M. B. CARSON

Foreman. [6]

[Title of District Court and Cause.]

### PREAMBLE

To the instructions to the Jury in the above entitled case, held in the U. S. District Court, Honolulu, Territory of Hawaii, on March 3, 1944, at 9:00 o'clock a.m.

Before: Hon. J. Frank McLaughlin, Judge, and  
a jury.

#### Appearances:

Edward Fowse, Esq.,

Assistant U. S. District Attorney,

Appearing for the Plaintiff;

O. P. Soares, Esq.,

Appearing for the Defendant.

Federal Court Building, Honolulu, T. H. [7]

#### Gentlemen of the Jury:

The testimony, the taking of evidence, has been concluded and the lawyers have made their arguments analyzing the testimony and given you their viewpoints upon the evidence and the issues of this case. They have also, in the course of their argument, stated to you what conclusions in their opinion should inevitably follow.

The lawyers and the jury and the judge have each their particular duties to perform in the trial of a criminal case. The lawyers for each side are required to present the testimony bearing upon the guilt or innocence of the party on trial. The duty of the judge is essentially to see that the trial is orderly conducted; that hearsay and immaterial

matters are excluded, and to advise the jury upon the law which is applicable to the case.

The function of the jury is separate and distinct from that of the lawyers and the judge. It is the duty of the jury to find what the facts are from the evidence which has been presented. In doing this, the jury must also consider the credibility of the witnesses who have testified.

The lawyers have performed their part of the trial, and I am now instructing you upon the law which is applicable, and your duty as jurors to find the facts is now at hand.

You are admonished to banish from your minds any prejudice which may be lurking there or any adverse sentiment with relation to the issues and to determine the case solely upon the facts presented to you within the issues of this case, and the law having relation to those facts.

In discharging your duty as jurors, you must not permit sympathy or passion or prejudice to affect your judgment, but you must determine this case within the narrow channel [8] of right and justice, keeping in mind the charge, the testimony, the law and the facts of this case. If the proof convinces you beyond a reasonable doubt that the defendant is guilty of the charge stated in the indictment, then your verdict must be "guilty." If, on the other hand, you have a reasonable doubt as to the defendant's alleged guilt of the charge stated in the indictment, it is imperative that you enter your verdict of "not guilty."

You have satisfied both the Government and the defendant in this case that you have no prejudice or preconceived notions concerning the issues of this case, and that your minds are free from passion and prejudice, and that you can and will determine the issues solely upon the evidence and the law.. Both sides have the right to rely upon this conception of your qualifications. I have no doubt but what you will eliminate from your minds every tendency to detract from the issues and that you will concentrate your thoughts upon the determination to do justice and right as your quickened conscience is aroused by the serious duty before you.

You can readily understand that any government can be maintained only by the enforcement of its laws. Neither you as the jury, nor I, as the judge, are concerned with the policies in back of the laws enacted by the Congress. This is a government of laws and not of man. You will understand that if the Congress, our law-making body, believes it to be to the best interest and welfare of the United States to enact a particular law and that if people decline or fail to live up to that law, and the court—consisting of the judge and the jury—fails to function in the enforcement of that law, or any other law, that it will [9] be only a short time until a condition of anarchy will prevail and no stable government can be maintained.

The Government, however, does not want an innocent man convicted. On the other hand, it does not want a guilty man to be set free when the testimony shows beyond a reasonable doubt that he is



guilty. The Government is as much interested in having an innocent man acquitted as it is in having a guilty man convicted. However, it does not want a guilty man to escape when the evidence shows beyond a reasonable doubt that he is guilty.

To the indictment which the grand jury returned against this defendant, this defendant entered a plea of not guilty. That is to say, he denied the charge stated in the indictment and placed himself upon his Country for the purpose of trial. The burden is upon the Government to show to your satisfaction, gentlemen, that this defendant is guilty beyond every reasonable doubt. This burden does not change at any time during the course of the trial. The defendant is presumed innocent of the charge stated in the indictment until he is proven guilty by the degree of proof to which I have previously referred. The presumption of innocence in favor of the defendant is not a mere formality to be disregarded by the jury at its pleasure. It is a substantive part of our criminal law. The presumption of innocence continues with the defendant throughout the trial until you are convinced by the evidence that he is guilty beyond every reasonable doubt.

When the indictment was returned by the grand jury against this defendant, the defendant had had no opportunity to present his side of the case. The indictment was found by the grand jury upon evidence presented to it by the [10] Government alone, and created in the minds of the grand jury a belief that it was probable that a crime had been com-

mitted and that this defendant probably committed that crime.

Upon the evidence *whif* it heard, the grand jury indicted this defendant, thereby indicating that it was probable that a crime had been committed, which should be disposed of in this court where both sides could be heard, and this is the stage which we have now reached.

I advise you, gentlemen, that it is the indictment in this case which frames the issues of the case.

I advise you that evidence is of at least two kinds; namely, direct and positive and circumstantial evidence. Positive evidence is the testimony of a person who heard something or saw something or said something or felt something; that is to say, something that can be readily perceived by the faculties. Circumstantial evidence is proof of such facts and circumstances surrounding a crime from which a jury may infer others and connected facts which usually or reasonably follow according to the common experience of mankind.

Circumstantial evidence is regular and competent in a criminal case, and when it is of such a character as to exclude every reasonable hypothesis except that the defendant is guilty, it is entitled to the same weight as direct evidence. Circumstantial evidence in any sense would have to be considered by you in connection with other evidence produced. But, to be of value, the circumstances must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his inno-

cence and inconsistent with every other reasonable hypothesis except [11] that of guilt.

A reasonable doubt, gentlemen, is just such a doubt as the term implies. It is a doubt for which you can give a reason. It must not arise from any merciful disposition or kindly, sympathetic feeling or desire to avoid performing a possibly disagreeable duty. It must be a substantial doubt, such as an honest, sensible, fair-minded man might, with reason, entertain consistently with a conscientious desire to ascertain the truth and to perform a duty. It is such a doubt as would cause a man of ordinary prudence, sensibility and decision, in determining an issue of great concern to himself, to pause or hesitate in arriving at his conclusion. It is a doubt which is created by the want of evidence or maybe by the evidence itself. It is not, however, a speculative imaginary or conjectural doubt.

It is not incumbent upon the Government in the trial of a criminal case to prove the defendant guilty beyond all possibility of doubt because that would be impossible. A juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the party charged.

If I have referred to any fact in the case, it has not been done to intimate to you any opinion which I have of the fact, although I would have a right to do that under the law. However, it is not my purpose to invade the province of the jury. It is your duty to find the facts of this case. You, the jury, are the sole and exclusive judges of the facts in this case and of the credibility of the witnesses.

If you have any idea that I have any opinion about this case as to the guilt or innocence of this defendant, I want you to disregard it. I want you to [12] arrive at your own independent conclusion from the evidence which has been presented and all the circumstances detailed by the witnesses.

Now, gentlemen, there are certain specific instructions which I have been requested by the attorneys to give you. These instructions follow. [13]

#### UNITED STATES INSTRUCTION No. 1

Gentlemen of the Jury, I charge you that the defendant, Timoteo Mariano Andres, stands charged with murder in the first degree. In this regard you are instructed that murder is in two degrees, first and second. The degrees are defined as follows:

"Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree."

Sec. 452 U. S. C. A., Title 18.

Given

JFMc

3-3-44 [14]

## UNITED STATES INSTRUCTION No. 2

You are instructed that it is an axiom of the law that every sane man is presumed to intend the ordinary, natural, ~~hostile~~, or necessary consequences of his voluntary act. ~~(This is no less true in a case where the act is homicidal than in any other case.)~~

In the absence of evidence to the contrary, he who takes the life of another by the infliction of a wound, or by some other means calculated to produce death, is presumed to have intended that result. ~~(and to have incurred the penalty of an intentional killing.)~~

~~Furthermore,~~ From the circumstance of the taking of the life of a human being by an act of a nature naturally and probably calculated to cause death, the law presumes that he who perpetrated the act foresaw and intended the result which followed, ~~(and must, hence, be guilty of murder,)~~ in the absence of evidence showing that the homicide was justifiable or excusable, or of evidence sufficiently rebutting the presumption of intent to take a human life. ~~(to raise a reasonable doubt on the question.)~~ Premeditation may be inferred from the circumstances of the case.

26 Am Jur § 304, pp. 359, 360

Given as amended

JFMc

3-3-44 [15]

## DEFENDANT'S INSTRUCTION No. 16

I instruct you, gentlemen of the jury, that an act is done wilfully when done intentionally and on pur-



pose. By premeditation, however, is meant "thinking out before hand," when one thinks over doing an act, and then determines or concludes to do it, he has premeditated the act. Malice, in the ordinary sense, means ill-will or hatred toward another; but in its legal sense it signifies a wrong act done without just cause or excuse.

Before you can convict the defendant of murder in the first degree, it is necessary for the prosecution to show from the evidence beyond a reasonable doubt, that the defendant, prior to the time of the killing formed the purpose or design to kill Carmen Gami Saguid. It is not necessary for such fixed design to be formed any definite time before the killing, but, if found at the time of the killing it would not be sufficient to make an act murder in the first degree, for it is essential, to constitute murder in the first degree, that the fixed purpose or design to kill should have been formed at some time before the killing.

Given

JFMc

3-3-44 [16]

### UNITED STATES INSTRUCTION No. 3

You are instructed that murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, ~~(and in the peace of the United States)~~ with malice aforethought, either expressed or implied. The term "~~express~~ malice" means that the homicide or killing was the result of a form designed, based upon a wicked and

depraved spirit, and is maliciously conceived and wickedly and maliciously executed without justifiable or lawful excuse.

Hotema v. U. S., 186 U. S. 413, 414

Given as amended

JFMc

3-3-44 [17]

UNITED STATES INSTRUCTION No. 4

You are further instructed that the state of mind of the accused at the time of <sup>the</sup> ~~forming the purpose~~ <sup>alleged homicidal act</sup> ~~to kill~~ is the factor in the determination of whether the homicide is murder in the first degree. First degree murder is distinguished from other grades of homicide primarily by the mental element known as "malice aforethought" ~~or "express malice,"~~ the unique characteristic of which is deliberation or <sup>specific intent</sup> premeditation—a ~~design~~ to take a life.

Evidence if any exists of hostility, quarrels, the utterance of threats, measures taken in preparation and the manner of killing may be considered by you in determining the presence or absence of express malice.

26 Am. Jur. § 38. p. 181

26 Am. Jur. § 466 p. 478

Given as amended

JFMc

3-3-44 [18]

## DEFENDANT'S INSTRUCTION No. 18

I instruct you, gentlemen of the jury, that the term "wilfully," as used in the indictment means intentionally; that is, not accidentally. "Deliberate" means in a cool state of <sup>mind</sup> ~~blood~~, not a sudden passion engendered by a lawful or just cause or provocation. "Malice" means done intentionally, without just cause or other legal excuse. "Malice aforethought" means done with malice and premeditation. "Premeditated" means thought of before hand for any length of time, however short.

Given

JFMc

3-3-44 [19]

## UNITED STATES INSTRUCTION No. 5

Gentlemen of the Jury, you are instructed that:

~~"Malice is defined in a general way to be the doing of a wrongful act without just cause or excuse in such a way, and under such circumstances, as to show that it was done wrongfully, and that it was done in the absence of that which would give the party the right to defend against it; or that it was done in the absence of mitigating circumstances. And it is defined again as the doing of a wrongful act without just cause or excuse, and in such a way as to show that he who did it had a heart void of social duty, and a mind fatally bent upon mischief."~~

Evidence if any

\* \* \* ~~Anything~~ that shows deliberation, anything that shows a premeditated purpose to do a wicked

or willful act that might result in death, is evidence that may be considered by the jury as evidence of malice, and of the existence of malice aforethought. U. S. v. Boyd (D. C. Ark. 1890) 45 F. 851, reversed on other grounds Boyd v. U. S. (1892) 142 U. S. 450 12 S. Ct. 292, 35 L. Ed. 1077."

Given as amended

JFMc

3-3-44 [20]

### DEFENDANT'S INSTRUCTION No. 19

I instruct you, gentlemen of the jury, that even though you believe from the evidence beyond all reasonable doubt that the defendant killed Carmen Gami Saguin, still if you do not believe that he premeditated the killing, that is, thought it out before hand, you must find the defendant not guilty of of murder in 1st degree.  
the crime charged.

So too, if you have a reasonable doubt on the question of whether the defendant premeditated the killing, that is, thought it out before hand, you  
of murder in the 1st degree.  
must find him not guilty of the crime charged.

Given as amended

JFMc

3-3-44 [21]

### DEFENDANT'S INSTRUCTION No. 20

I instruct you, gentlemen of the jury, that even if you believe from the evidence beyond a reasonable doubt that the defendant stabbed Carmen Gami

Saguid, but you further believe from the evidence, or have a reasonable doubt on the point that at the time of the stabbing defendant was in a violent passion and while under said violent passion he did stab and kill the said Carmen Gami Saguid, then such killing was done without deliberation and of murder in 1st degree. you cannot find the defendant guilty as charged.

Given

JFMc

3-3-44 [22]

#### UNITED STATES INSTRUCTION No. 7

I instruct you that evidence of previous difficulties and threats made by the accused to the deceased may be considered by you even though they may be of a general and indefinite nature, and their weight or probative force is a question solely within your province to determine. In this connection, remoteness in point of time prior to the homicide may be considered by you merely as bearing upon the weight which you give to the testimony.

26 Am. Jur. § 357, pp. 402 and 403.

Given

JFMc

3-3-44 [23]

#### DEFENDANT'S INSTRUCTION No. 17

I instruct you, gentlemen of the jury, that when the evidence fails to show any motive to commit the crime charged this is a circumstance in favor of the defendant; and, in this case, if you find, upon a care-



ful consideration of all the evidence, that it fails to show any *notice* on the part of the defendant to commit the crime charged against him, then this is a circumstance which you must consider, in connection with all the evidence, in arriving at your verdict.

Given

JFMc

3-3-44 [24]

DEFENDANT'S INSTRUCTION No. 10

I instruct you, gentlemen of the jury, that the indictment in this case contains merely the formal statement of the charge against the defendant and is not to be taken as any evidence of defendant's guilt. The plea of "not guilty" of the defendant puts in issue every material allegation of the indictment and is as effective a denial of the prosecution's accusations against him as if he had taken the stand and denied each statement of the government's witnesses categorically.

State v. Miller, 190 No. 449; 89 SW 377.

State v. Brown, 100 Iowa 50; 89 NY 277.

Given

JFMc

3-3-44 [25]

DEFENDANT'S INSTRUCTION No. 2

The indictment in this case is in no sense evidence or proof that the defendant has committed the alleged crime. It is merely a formal allegation, required by law, alleging that the crime was commit-

ted in the form and manner therein set forth. No juror should suffer himself to be influenced in any degree whatsoever by the fact that this indictment has been returned against the defendant.

Given

JFMc

3-3-44 [26]

### INSTRUCTION No. 3

The defendant in a criminal case need not take the witness stand or offer any evidence in his behalf. Nor can you take into consideration in arriving at your verdict any reason or motive which may have actuated him in not offering a defense on his own behalf.

Given

JFMc

3-3-44 [27]

### DEFENDANT'S INSTRUCTION No. 4

The presumption of innocence is not a mere form to be disregarded by you at pleasure, but it is an essential, substantial part of the law of the land, and binding upon you and it is your duty to give the defendant the full benefit of this presumption of innocence and to find him not guilty unless the evidence satisfies you of his *guilty* beyond all reasonable doubt.

Given

JFMc

3-3-44 [28]

## DEFENDANT'S INSTRUCTION No. 8

I instruct you, gentlemen of the jury, that the defendant is presumed to be innocent of the offense charged against him, and you must find him not guilty, unless you are satisfied of his *guilty* beyond every reasonable doubt. This is not a mere technical rule to be lightly considered by you, but is a humane provision of the law to which you must give due regard, and if the evidence leaves a reasonable doubt in your mind as to the *guilty* of the defendant or as to any material allegation of the indictment you are bound by the provisions of law and by your oaths, to find the defendant not guilty.

Given

JFMc

3-3-44 [29]

## DEFENDANT'S INSTRUCTION No. 5

You are instructed that in a criminal case ~~of this nature~~, the burden of proof as characterized in these instructions, never shifts to the defendant, but remains upon the United States of America throughout the case to prove the guilt of the defendant beyond all reasonable doubt. This burden does not, under any circumstance, shift to the defendant to prove his innocence.

Given as amended

JFMc

3-3-44 [30]

## DEFENDANT'S INSTRUCTION No. 6

Under the law no jury should convict a person charged with crime upon mere suspicion, however strong, or simply because there is a preponderance of all of the evidence in the case against him, or simply because there are strong reasons to suspect him guilty. What the law requires before the defendant can be convicted of crime is not suspicion, not mere probabilities, but proof of his *guilty* beyond all reasonable doubt.

Given

JFMc

3-3-44 [31]

## DEFENDANT'S INSTRUCTION No. 7

I further instruct you, that it is in nowise incumbent upon the defendant to explain away the evidence offered by any of the witnesses on behalf of the government, nor to produce

~~If from the evidence before you, you cannot say that the defendant is guilty beyond all reasonable doubt, you must find the defendant not guilty even though he has not produced any evidence to explain why he has been accused of the crime described in the indictment.~~

Given as amended

JFMc

3-3-44 [32]

DEFENDANT'S INSTRUCTION No. 15

I instruct you, gentlemen of the jury, that you cannot convict the defendant *or* murder unless the government has established the truth of each and every material allegation of the indictment to your satisfaction and beyond all reasonable doubt. The material allegations of the indictment are:

1. That the defendant
2. at the Civilian Housing Area No. 3, Pearl Harbor, Island of Oahu
3. Said Civilian Housing Area being on lands reserved or acquired for the use of the United States of America and under the concurrent jurisdiction thereof, within the District of Hawaii, and within the jurisdiction of this court;
4. did unlawfully, wilfully, and feloniously
5. *did* deliberate premeditated malicious design
6. with malicious aforethought
7. kill Carmen Gami Saguid
8. By stabbing and inflicting mortal wounds upon the body of Carmen Gami Saguid
9. Thereby perpetrating the crime of murder.

Given

JFMc

3-3-44 [33]



## UNITED STATES INSTRUCTION No. 9

I instruct you that you may return a qualified verdict in this case by adding the words "without capital punishment" to your verdict. This power is conferred solely upon you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment.

Winston vs. U. S. 172 U. S. 303, 312

Given

JFMc

3-3-44 [34]

## DEFENDANT'S INSTRUCTION No. 22

I instruct you, gentlemen of the jury that even if you should unanimously agree from the evidence beyond all reasonable doubt that the defendant is guilty as charged, you may qualify your verdict by adding thereto "without capital punishment" in which case the defendant shall not suffer the death penalty.

In this connection, I further instruct you that you are authorized to add to your verdict the words "without capital punishment," and this you may do no matter what the evidence may be and without regard to the existence of mitigating circumstances.

Given as amended

JFMc

3-3-44 [35]

INSTRUCTION No. 10

Gentlemen of the Jury you are instructed that before you may return a qualified verdict of murder in the first degree without capital punishment that your decision to do so must be unanimous.

Smith vs. U. S. (CCA 9th) 1931, 47 Fed 2d  
518

Given

JFMc

3-3-44 [36]

DEFENDANT'S INSTRUCTION No. 14

The unanimous agreement of the jury is necessary to a verdict. This is in no wise to be considered by you as a justification for abandoning your individual convictions or beliefs or doubts. While a unanimous verdict is required it must be arrived at by each juror's voting as he believes the law and the evidence justifies him to vote. While, of course, each of you must give due regard to the opinions of the others, you are not required to substitute the opinion of a fellow juror for your own simply for the purpose of arriving at a unanimous verdict.

To illustrate, if after full and fair deliberation, one or more of you believe from the law and the evidence that the guilt of the defendant is established so clearly and convincingly as to leave no reasonable doubt in your minds, you are not to vote "not guilty" merely because a majority of the jury does not believe the defendant guilty or has a reasonable doubt of his guilt. So, too, if one or more

of you, after a fair and impartial discussion with your fellow jurors, are not convinced from the evidence and the law beyond a reasonable doubt that defendant has been proved to be guilty of the crime charged, you are not to vote "guilty" merely because a majority votes that way. The "unanimous" verdict of the jury must be the sum total of your individual beliefs and is not to be arrived at by an arrangement of mere compromise, as for instance, finding the defendant guilty of a lesser offense than the crime charged, unless you are in unanimous agreement that all the elements of a lesser offense have been proved beyond a reasonable doubt.

Given

JFMc

3-3-44 [37]

### UNITED STATES INSTRUCTION No. 11

Gentlemen of the Jury, I instruct you that you may find any one of the following verdicts, as the evidence and the circumstances in the evidence, in accordance with these instructions, may warrant:

(1) That the defendant is guilty of murder in the first degree.

(2) That the defendant is guilty of murder in the first degree without capital punishment.

(3) That the defendant is guilty of murder in the second degree.

(4) That the defendant is not guilty.

Given

3-3-44 [38]

[Title of District Court and Cause.]

**UNITED STATES' REQUESTED  
INSTRUCTIONS**

Comes now the United States of America by G. D. Crozier, United States Attorney for the District of Hawaii, and respectfully requests the Court to give to the jury the following instructions, Numbers one (1) to ....., inclusive.

**THE UNITED STATES OF  
AMERICA,**

**Plaintiff**

**C. D. CROZIER**

**United States Attorney**

**District of Hawaii**

**By (Signed) EDWARD TOWSE**

**Assistant United States**

**Attorney**

**District of Hawaii [40]**

**UNITED STATES INSTRUCTION No. 6**

Gentlemen of the Jury, you are instructed that:

“Malice, legally speaking, in relation to murder, is a conscious violation of law to the prejudice of another; evil design in general, the dictates of a wicked, depraved and malignant heart.”

U. S. vs. Hart (C. C. Fla. 1908) 162 Fed. 192

Withdrawn

JFMc

3-3-44 [41]

## UNITED STATES INSTRUCTION No. 8

You are instructed that in considering the knife, the stiletto and the revolver, as evidence in this case, and the fact that the evidence does not disclose the stiletto or revolver as having been used in the actual homicide, that you may nevertheless consider all evidence regarding the stiletto and the revolver as bearing upon the facts in evidence of preparation, design, plan, intent, and that the defendant was armed with these weapons when he perpetrated the homicide.

U. S. vs. Peterson, (CCA N. Y.) 271 F. 187  
22 C.J.S. Par. 712, pp. 1210, 1211

Denied

J.F.Mc

3-3-44 [42]

[Title of District Court and Cause.]

DEFENDANT'S REQUEST FOR  
INSTRUCTIONS

Comes now Timoteo Mariano Andres, defendant above named, by O. P. Soares, his attorney, and requests the Court to instruct the jury as per Instructions Nos. 1 to 22 inclusive hereto attached.

Dated at Honolulu, Hawaii, this 3rd day of March, 1944.

Timoteo Mariano Andres,  
Defendant,

(Signed) by O. P. SOARES

his attorney [44]



## DEFENDANT'S INSTRUCTION No. 21

I instruct you, gentlemen of the jury, that ~~is~~ is proper for you to inquire what motive, if any, consistent with sanity is shown by the evidence to have existed in the mind of the defendant for taking the life of Carmen Gami Saguid in the way, place, and circumstances in which it is claimed the act was done; and if there is a want of such motive, as shown by the whole evidence, for the alleged crime; the fact that it was done under circumstances which rendered detection and arrest inevitable, if it was so done, are points for your consideration.

Withdrawn

3-3-44

J.F.Me [45]

## DEFENDANT'S INSTRUCTION No. 13

The rule of law is that if two reasonable constructions can be placed on the evidence, one of which is consistent with defendant's innocence of the crime charged or any other offense included therein or even leaves a reasonable doubt in your minds as to his guilt even though the other is equally consistent with his guilt, you still must find him "not guilty." Otherwise stated, the rule of the law is that if two reasonable constructions can be placed on the evidence, one of which is consistent with defendant's innocence of the crime charged or any other offense included therein or even leaves a reasonable doubt in your minds as to his guilt even though the other

is equally consistent with his guilt, you still must find him "not guilty."

I further instruct you that mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that upon the doctrine of chances, it is more probable that the defendant is guilty.

Withdrawn

3-3-44

J.F.Me [46]

#### DEFENDANT'S INSTRUCTION No. 12

You are instructed that in considering this case you are bound to act upon the presumption that the defendant is innocent, and you should endeavor, if possible, to reconcile all the facts of the case with that of innocence.

Withdrawn

3-3-44

J.F.Me [47]

#### DEFENDANT'S INSTRUCTION No. 11

I further instruct you, that it is in nowise incumbent upon the defendant to explain away the evidence offered by any of the witnesses on behalf of the government.

If from the evidence before you, you cannot say that the defendant is guilty beyond all reasonable doubt, you must find the defendant not guilty even though he has not produced any evidence to explain

why he has been accused of the crime described in the indictment!

Withdrawn

3-3-44

J.F.Mc [48]

DEFENDANT'S INSTRUCTION No. 9

I instruct you, gentlemen of the jury, that in criminal cases, even when the evidence is so strong, that it demonstrates the probability of the guilt of the party accused as set forth in the indictment, still if it fails to establish beyond a reasonable doubt the guilt of the defendant in manner and form as charged in the indictment, then it is the duty of the jury to acquit the defendant and bring in a verdict of not guilty.

I further instruct you that mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that upon the doctrine of chances, it is more probable that the defendant is guilty. To warrant a conviction of the defendant he must be proved to be guilty so clearly and conclusively that there is no reasonable theory upon which he can be innocent of the one crime charged in the indictment in this one case, when all the evidence of the case is considered together.

Sackett's Instructions, p. 472.

Withdrawn

J.F.Mc

3-3-44 [49]

## INSTRUCTION No. 1

I instruct you, gentlemen of the jury, to find the defendant Not Guilty.

Denied

J. F. Mc.

3-3-44

[Endorsed]: Filed Jul. 21, 1944. [50]

[Title of District Court and Cause.]

## VERDICT

We, the Jury, duly empaneled and sworn in the above entitled cause, do hereby find the defendant, Timoteo Mariano Andres, guilty of murder in the first degree.

Dated: Honolulu, T. H., this 3rd day of March, 1944.

(S) WILLIAM A. HAM

Foreman of Jury [52]

[Title of District Court and Cause.]

## MOTION FOR A NEW TRIAL

And now comes said defendant, Timoteo Mariano Andres, By O. P. Soares, his attorney, and moves the court to vacate the verdict found by the jury in the above entitled action on the 3rd day of March, 1944, and to grant said defendant, Timoteo Mariano Andres, a new trial of this action, for the following causes which affect materially his substantial rights, to-wit:

I.

Irregularity in the proceedings of the court by which said defendant was prevented from having a fair trial, in this that certain gruesome photographs of the naked dead body of Carmen Gami Saguid purporting to show the wounds of which the said Carmen Gami Saguid died, which photographs could then serve no purpose but to inflame the minds of the jurors against the defendant, were sent into the jury room for the scrutiny of the jury, they, the jury, not having directly or indirectly requested the same;

II.

Said verdict is contrary to law, in this that the effect of said verdict is to require that the defendant be sentenced to suffer the [54] death penalty, whereas no means of inflicting the death penalty in cases arising in this court is provided by law;

III.

Because the Court erred in charging the jury as follows, to wit:

I instruct you that you may return a qualified verdict in this case by adding the words "without capital punishment" to your verdict. This power is conferred solely upon you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment.



## IV.

Because the Court erred in charging the jury as follows, to wit:

Gentlemen of the Jury you are instructed that before you may return a qualified verdict of murder in the first degree without capital punishment that your decision to do so must be unanimous.

Smith vs. U. S. (CCA 9th) 1931,

47 Fed 2d 518;

## V.

Because the Court erred in charging the jury as follows:

In discharging your duty as jurors, you must not permit sympathy or passion or prejudice to affect your judgment, but you must determine this case within the narrow channel of right and justice, keeping in mind the charge, the testimony, the law and the facts of this case. If the proof convinces you beyond a reasonable doubt that the defendant is guilty of the charge stated in the indictment, then your verdict must be "guilty." [55]

## VI.

Because the Court erred in charging the jury as follows:

The indictment was found by the grand jury upon evidence presented to it by the Government alone, and created in the minds of the grand jury a belief that it was probable that a crime had been committed and that this defendant probably committed that crime.

Upon the evidence which it heard, the grand jury indicted this defendant, thereby indicating that it was probable that a crime had been committed, which should be disposed of in this court where both sides could be heard, and this is the stage which we have now reached.

### VII.

Because the Court erred in charging the jury as follows:

A reasonable doubt, gentlemen, is just such a doubt as the term implies. It is a doubt for which you can give a reason. It must not arise from any merciful disposition or kindly, sympathetic feeling or desire to avoid performing a possibly disagreeable duty.

### VIII.

Because the Court and the jury which rendered the verdict in the above entitled matter were without jurisdiction for that paragraph numbered 3.02 of General Orders No. 2 of the Military Governor of the Territory of Hawaii provides that charges involving major offenses shall be referred to a military commission for trial and determination, and it was not otherwise ordered by the Military Governor of the Territory of Hawaii either at the time of the offense charged in the indictment returned in the above entitled matter, or up to the time of the verdict rendered in said matter, or at any time.

Dated at Honolulu, Hawaii, this 17th day of March, 1944.

**TIMOTEO MARIANO ANDRES**

Defendant,

By (Signed) O. P. SOARES

his attorney.

[Endorsed]: Filed Mar. 17, 1944. [56]

[Title of District Court and Cause.]

**MOTION IN ARREST OF JUDGMENT AND  
TO STAY IMPOSITION OF SENTENCE**

And now comes said defendant, Timoteo Mariano Andres, by O. P. Soares, his attorney, after verdict of the jury which tried said cause, and before any judgment rendered thereon by the court, and moves the court to arrest the judgment in this cause and to stay the imposition of sentence on him, the said defendant, for the following reason: -

That the effect of said verdict is to require that the defendant be sentenced to suffer the death penalty, whereas no means of inflicting the death penalty in cases arising in this court is provided by law.

Wherefore, and for the reasons aforesaid, the defendant prays that said judgment be arrested and imposition of sentence be stayed.

Dated at Honolulu, Hawaii, this 24th day of March, 1944.

**TIMOTEO MARIANO ANDRES,**

Defendant,

By (S) O. P. SOARES

his attorney.

[Endorsed]: Filed Mar. 24, 1944. [58]

District Court of the United States

District of Hawaii

October Term 1943

No. 9562 Criminal Indictment in One (1) Count  
for violation of 18 U.S.C. 452, Criminal Code  
Section 273.

**UNITED STATES**

vs.

**TIMOTEO MARIANO ANDRES**

**JUDGMENT, COMMITMENT AND  
SENTENCE**

On this 31st day of March, 1944, came the Assistant United States Attorney Edward Towse, and the Defendant, Timoteo Mariano Andres appearing in proper person and by counsel, Mr. O. P. Soares, Esquire, and,

The defendant having been convicted by a jury upon a verdict of guilty of the offense charged in the Indictment, in the above-entitled cause, to-wit:

that the Defendant did, at Civilian Housing Area, #3 Pearl Harbor, Island of Oahu, unlawfully, wilfully, feloniously and with malice aforethought and premeditated design, wilfully, deliberately, maliciously with premeditation and malice aforethought, kill a human being, to wit: Carmen Gami Saguid, then and thereby perpetrating the offense of murder in the first degree.

And the defendant having been asked whether he had anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is The Judgment and Sentence Of This Court

That the Defendant be committed to the custody of the Attorney General of the United States, to be hanged by the neck until dead during the week of May 14, 1944, at a place and day and hour within that week to be fixed by the United States Marshal for the District of Hawaii;

It is Further Ordered that the Clerk deliver a certified copy of this Judgment and Sentence to the United States Marshal.

Dated at Honolulu, T. H., this 1st day of April, 1944.

(Signed) J. FRANK McLAUGHLIN

Judge United States District  
Court, District of Hawaii

[Endorsed]: Filed Apr. 4, 1944. [60]



From the Minutes of the United States District  
Court for the Territory of Hawaii

Friday, December 17, 1943

[Title of Court and Cause.]

The grand jurors appeared in a body and through their foreman, Mr. Merwin B. Carson, in the presence of Mr. G. D. Crozier, United States Attorney, and Mr. Edward A. Towse, Assistant United States Attorney, returned an Indictment charging the defendant above named with the violation of Title 18, Section 273, United States Code.

The Court ordered that the Indictment be placed on file. [61]

From the Minutes of the United States District  
Court for the Territory of Hawaii

Monday, December 20, 1943

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, and also came the defendant herein, without counsel. This case was called for arraignment.

The defendant was handed a copy of the indictment and was duly arraigned.

The Court then stated that as required by law, a plea of not guilty must be entered in this case and it was so ordered.

The defendant was advised of his right to counsel

and also as to his right to be released on bail. Mr. Towse informed the Court that he would object to the release of this defendant on bail. This matter was then passed off to the foot of the calendar.

At 11:25 a. m., the Court ruled that under Section 597, Title 18, United States Code, the Court may set bail for the release of the defendant in this case. Mr. Towse renewed his objection to the setting of bail and outlined the danger of the defendant's being released from custody. He stated, however, that should the Court allow the defendant bail, that the amount be fixed in the sum of \$25,000.00.

Bail was set at that amount by the Court and this case was continued to December 23, 1943 at 9 a. m. for the appointment of counsel. [62]

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From the Minutes of the United States District  
Court for the Territory of Hawaii

Thursday, December 23, 1943

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney and also came the defendant herein without counsel. This case was called for the appointment of counsel.

Following a discussion on this matter, the Court further continued this case for the purpose of appointing counsel, and the defendant was so advised.

[63]

From the Minutes of the United States District  
Court for the Territory of Hawaii

Tuesday, December 28, 1943

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, the defendant herein was absent. This case was called for the appointment of counsel.

The Court appointed Mr. O. P. Soares as counsel for said defendant, and also advised Mr. Soares that he would appoint an associate counsel if he so desired. [64]

From the Minutes of the United States District  
Court for the Territory of Hawaii

Monday, February 28, 1944

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for trial by jury.

Mr. Soares moved to quash the venire upon the grounds that the jurors called in this case were not representative of the body of the district for the reason that names drawn from the outlying islands were set aside, the drawing being confined to the Island of Oahu. The motion, which was resisted by Mr. Towse, was denied by the Court, and an exception allowed the defendant.

The following named jurors were duly empaneled:

Raymond E. Melim	William A. Ham
Joseph Ballard Atherton	Joseph J. Davis
Robert A. McEldowney	Sylvester K. McKeague
Edward F. Rowold	Joseph Ahue
George G. Moller	Frank A. Beckert
Joaquin S. Botelho	

The jury panel being exhausted, the Court ordered that this case be continued to Tuesday, February 29, 1944 at 9 a. m. for further trial. [65]

From the Minutes of the United States District  
Court for the Territory of Hawaii

Tuesday, February 29, 1944

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for trial by jury.

The following named jurors were duly empaneled and sworn to try the issues herein:

Raymond E. Melim	Joseph J. Davis
Joseph Ballard Atherton	Sylvester K. McKeague
Robert A. McEldowney	Joseph Ahue
Edward F. Rowold	Lionel V. Brash
George G. Moller	Charles J. Williams
William A. Ham	John Enos Botelho

At 9:20 a. m. opening statement was made by Mr. Towse.

Mr. Domingo Saguid, husband of the victim, Carmen Saguid, was called and sworn and testified on behalf of the United States.

Snapshot of Carmen Saguid was admitted in evidence as United States Exhibit No. 1, marked and ordered filed.

Enlargement of photograph of the victim was marked for identification as United States "A."

Enlargement of photograph of the victim was marked for identification as United States "B."

Enlargement of photograph of the victim was marked for identification as United States "C."

United States "A" heretofore marked for identification was admitted in evidence as United States Exhibit No. 2, marked and ordered filed over the objections of Mr. Soares. [66]

Objections to the offer in evidence of United States "B" heretofore marked for identification were sustained by the Court.

United States "C" heretofore marked for identification was admitted in evidence as United States Exhibit No. 3, marked and ordered filed over the objections of Mr. Soares.

Mr. John Sterling Adams, Special Agent Federal Bureau of Investigation, was called and sworn and testified on behalf of the United States.

Enlargement of photograph of Civilian Housing Area No. 3, was marked for identification as United States "D."

Enlargement of photograph of Civilian Housing Area No. 3, was marked for identification as United States "E."



Enlargement of photograph of Civilian Housing Area No. 3, was marked for identification as United States "F."

Enlargement of photograph of Civilian Housing Area No. 3, was marked for identification as United States "G."

United States "D" heretofore marked for identification was admitted in evidence as United States Exhibit No. 4, marked and ordered filed over the objection of Mr. Soares.

United States "F" heretofore marked for identification was admitted in evidence as United States Exhibit No. 5, marked and ordered filed over the objections of Mr. Soares.

United States "E" heretofore marked for identification was admitted in evidence as United States Exhibit No. 6, marked and ordered filed over the objections of Mr. Soares.

Mr. Arthur C. Ables, employee Kodak Hawaii, Ltd., was called and sworn and testified on behalf of the United States.

Negatives of photographs, United States Exhibits Nos. 2, 3, 4, 5, and 6, and United States "B" and "A" were offered in evidence and were ordered annexed to the exhibits admitted and those marked for identification. [67]

Dr. Robert G. Benson of Civilian Housing Area No. 3 was called and sworn and testified on behalf of the United States.

Mr. Grover Merk, sheetmetal worker, Pearl Harbor, was called and sworn and testified on behalf of the United States.

Mr. Frank T. Bielawski, machinist, Pearl Harbor, was called and sworn and testified on behalf of the United States.

Mr. Antonio Salvador Tomoso, Assistant Dormitory man, Civilian Housing Area No. 3, was called and sworn and testified on behalf of the United States.

United States "G" heretofore marked for identification was admitted in evidence as United States Exhibit No. 7, marked and ordered filed over the objections of Mr. Soares.

Upon request of Mr. Soares, the Court placed all witnesses under rule of court, excluding them from the courtroom.

Miss Glaciera Sismar, clerk Civilian Housing Area No. 3, was called and sworn and testified on behalf of the United States.

Mr. Irving Furman, pipefitter helper, Pearl Harbor, was called and sworn and testified on behalf of the United States.

At 12:13 p. m., the Court admonished the jurors and ordered that this case be continued for further trial to Wednesday, March 1, 1944 at 9 a. m. [68]

From the Minutes of the United States District Court for the Territory of Hawaii

Wednesday, March 1, 1944

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for further trial by jury.

It was stipulated that the jury heretofore empaneled and sworn to try the issues herein was present.

Mr. Irving Furman resumed the witness stand on cross examination.

Mr. Wayne H. Thorn, caulker, Pearl Harbor, was called and sworn and testified on behalf of the United States.

Mr. Clark E. Stoltz, motor mechanic, Pearl Harbor, was called and sworn and testified on behalf of the United States.

Mr. Isabelo R. Cabato, bed checker, Civilian Housing Area No. 3, was called and sworn and testified on behalf of the United States.

Mr. Jewel E. Knight, Manager Coffee Shop, Civilian Housing Area No. 3, was called and sworn and testified on behalf of the United States.

Mrs. Ann Martin Rico, Clerk, Civilian Housing Area No. 3, was called and sworn and testified on behalf of the United States.

Mr. James Leslie Green, Officer, Civil Service Police Force, Pearl Harbor, was called and sworn and testified on behalf of the United States.

A black handle spring-knife was marked for identification as United States "H."

A stiletto in colored sheath was marked for identification as United States "I." [69]

A .22-cal. revolver was marked for identification as United States "J."

Mr. William Morris Hameon, Sergeant, Civil Service Police Force, Pearl Harbor, was called and sworn and testified on behalf of the United States.

Mr. George Alexander Richardson, Jr., electrician,

cian and volunteer ambulance driver, Civilian Housing Area No. 3, was called and sworn and testified on behalf of the United States.

Mr. Carlos Raymond Hulse, Lieutenant, U. S. Marine Corps, assigned to Civil Service Police Force, Pearl Harbor, was called and sworn and testified on behalf of the United States.

Mr. John Sterling Adams was recalled to the witness stand and gave further testimony.

Enlargement of photograph of the victim heretofore marked for identification as United States "B" was admitted in evidence as United States Exhibit No. 8, marked and ordered filed over objections by Mr. Soares.

United States "H," black handle spring-knife, was admitted in evidence as United States Exhibit No. 9, marked and ordered filed over the objection of Mr. Soares.

United States "I," stiletto, was admitted in evidence as United States Exhibit No. 10, marked and ordered filed over the objections of Mr. Soares.

United States "J," 22-cal. revolver, was admitted in evidence as United States Exhibit No. 11, marked and ordered filed over the objections of Mr. Soares. However, the objections of Mr. Soares to the offer in evidence by Mr. Towse of 8 22-cal. cartridges were sustained by the court.

At 12:20 p. m., the Court admonished the jurors and ordered that this case be continued for further trial to Thursday, March 2, 1944 at 9 a. m. [70]

From the Minutes of the United States District  
Court for the Territory of Hawaii

Thursday, March 2, 1944

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for further trial by jury.

It was stipulated that the jury heretofore empaneled and sworn to try the issues herein was present.

Dr. Richard K. Chun, Assistant City and County Physician, was called and sworn and testified on behalf of the United States.

Mr. Alejandro Meranda Santa Monica was called and sworn and testified on behalf of the United States.

Certified copies of Declaration of Taking and Order and Judgment on Declaration of Taking in Civil No. 436 of this court were admitted in evidence as United States Exhibit No. 12, marked and ordered filed.

Mr. John H. Bergen, site engineer, 14th Naval District, was called and sworn and testified on behalf of the United States.

Location plan, housing area No. 3, was admitted in evidence as United States Exhibit No. 13, marked and ordered filed.

Mr. James A. Johnstone, Lieutenant, United States Navy, Executive Officer Civilian Housing



Area No. 3, was called and sworn and testified on behalf of the United States.

At 10:25 a. m. the government rested its case.

Motion by Mr. Soares to strike from the record United States Exhibits Nos. 10 and 11 was denied by the Court, and an exception allowed the defendant.

Upon request of Mr. Soares, the Court ordered that this case be continued for further trial at 9 a. m. Friday, March 3, 1944. The Court admonished the jurors. [71]

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From the Minutes of the United States District  
Court for the Territory of Hawaii

Friday, March 3, 1944

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for further trial by jury.

It was stipulated that the jury heretofore empaneled and sworn to try the issues herein was present.

Opening statement was waived by the defense following which the defense rested its case.

Mr. Soares then moved for a directed verdict of not guilty of first degree murder as charged in the Indictment.

The Court excused the jurors from the courtroom and argument on the motion was had by Mr. Soares.

At 9:18 a. m., the jurors were recalled to the court room.

The Court denied the motion for a directed verdict of not guilty of first degree murder, and allowed the defendant an exception.

At 9:20 a. m., the Court excused the jurors until 10:30 a. m. and instructed Mr. Soares, the defendant, the interpreter, the reporter, and the clerk to retire to chambers for settlement of instructions.

At 10:55 a. m., the jury was recalled and it was stipulated that the jury herein was present.

Opening argument was had by Mr. Towse.

At 11:25 a. m. argument was had by Mr. Soares, and at 12:03 a. m., closing argument was had by Mr. Towse. [72]

At 12:11 p. m., the Court instructed the jury.

Exceptions were then noted by Mr. Soares to the Court's giving of Government's Instructions Nos. 2, 4, 7, and 10, and the Court's refusal to give Defendant's Requested Instruction No. 1.

At 12:45 p. m., Mr. Otto F. Heine, United States Marshal, and Mr. Thos. R. Clark and Mr. E. M. Moses, Deputy United States Marshals, were sworn as bailiffs to take charge of the jury during its deliberations.

The Court then instructed the Marshals to take the jurors to lunch and then return to deliberate, said jurors returning at 2:05 p. m.

At 2:45 p. m., the Court, upon request of the jurors through the United States Marshal, or-

dered that the exhibits herein be delivered to said jurors in the jury room.

At 3:45 p. m., the jurors appeared and through their foreman, Mr. William A. Ham, requested instructions from the Court as to the penalty under a first degree murder charge.

The Court then further instructed the jury, following which the jurors retired to deliberate further.

At 6:08 p. m., the Court instructed the Marshals to take the jurors to dinner and then return to deliberate, said jurors returning at 8:02 p. m.

At 8:50 p. m., the jury returned and through their foreman returned the following verdict: [73]

Cr. No. 9562

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTEO MARIANO ANDRES,

Defendant.

“VERDICT

“We, the Jury, duly empaneled and sworn in the above entitled cause, do hereby find the defendant, Timoteo Mariano Andres, guilty of murder in the first degree.

"Dated: Honolulu, T. H., this 3rd day of March, 1944.

(S) WILLIAM A. HAM  
Foreman of Jury"

The Court then ordered that this case be continued for sentence to March 6, 1944, at 2 p. m.

Exceptions were noted and a Notice of Appeal was given by Mr. Soares.

The Court then excused the jurors. [74]

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From the Minutes of the United States District  
Court for the Territory of Hawaii

Monday, March 6, 1944

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for sentence.

Upon motion of Mr. Soares, who advised the Court that he will file a motion for new trial, there being no objections, the Court ordered that this case be continued for sentence to Friday, March 10, 1944 at 10 a. m. [75]

From the Minutes of the United States District  
Court for the Territory of Hawaii

Friday, March 10, 1944

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for sentence.

Upon motion of Mr. Soares, there being no objections by Mr. Towse, the Court ordered that this case be continued for sentence to Friday, March 17, 1944 at 10 a. m. [76]

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From the Minutes of the United States District  
Court for the Territory of Hawaii

Friday, March 17, 1944

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for sentence.

Mr. Soares presented to the Court a motion for a new trial, which was ordered filed by the Court.

Upon motion by Mr. Towse, there being no objections by Mr. Soares, the Court ordered that this case be continued for hearing on argument for new trial on Friday, March 24, 1944 at 10 a. m. [77]



From the Minutes of the United States District  
Court for the Territory of Hawaii

Friday, March 24, 1944

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for hearing on motion for new trial.

Following argument by respective counsel, the Court denied the motion for new trial and allowed the defendant an exception.

Mr. Soares then presented to the Court a motion in arrest of judgment and to stay imposition of sentence, which was ordered filed by the Court.

Said motion was submitted without argument, and was denied by the Court, and an exception allowed the defendant.

Thereafter, the Court ordered that this case be continued to Friday, March 31, 1944 at 9 a. m. for sentence. [78]

From the Minutes of the United States District  
Court for the Territory of Hawaii

Friday, March 31, 1944

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, and also came the defendant herein with Mr. O. P. Soares, his counsel. This case was called for sentence.

Upon request of Mr. Soares, there being no objections by Mr. Towse, the Court appointed Rufus George Allen associate counsel with Mr. Soares.

Upon the verdict of guilty, the Court adjudged the defendant guilty as charged in the Indictment and ordered that the defendant be committed to the custody of the Attorney General or his authorized representative to be hanged by the neck until dead during the week of May 14, 1944, at a place and day and hour within that week to be fixed by the United States Marshal for the District of Hawaii. [79]

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From the Minutes of the United States District  
Court for the Territory of Hawaii

Wednesday, April 12, 1944

[Title of Court and Cause:]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, and also came Mr. O. P. Soares and Mr. Rufus G. Allen, Jr., counsel for the defendant herein. This case was called for hearing on Notice of Appeal.

Mr. Soares informed the Court that he would file a motion to appeal in forma pauperis. [80]

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From the Minutes of the United States District  
Court for the Territory of Hawaii

Thursday, July 27, 1944

[Title of Court and Cause.]

On this day came Mr. Edward A. Towse, Assistant United States Attorney, and also came Mr. O. P. Soares, counsel for the defendant herein, and this case was called for the purpose of securing the Court's directions on what pleadings in this case shall be included in the record on appeal when prosecuted upon the clerk's record of proceedings, as provided under Rule VIII of Criminal Appeals Rules.

Following a discussion by the Court and respective counsel on said Rule VIII, the Court directed the clerk to include in the record on appeal in this case, the following pleadings:

Indictment.

Instructions, given and refused.

Verdict.

Motion for New Trial.

Motion for Arrest of Judgment.

Judgment, Commitment, and Sentence.

Notice of Appeal.

Assignment of Errors.

Designation of Record.

Clerk's Minutes.

Mr. Soares noted an exception to the Court's refusal to grant his request to include in the record U. S. Exhibits Nos. 3 and 8. [81]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendant above named appeals from the Judgment of the Honorable J. Frank McLaughlin entered in, the above entitled matter on the 4th day of April, 1944.

Name and Address of Appellant: Kamehameha Highway corner Puuhale Road, Honolulu, Hawaii.

Name and Address of Appellant's Attorneys: O. P. Soares, P. O. Box 2702, Honolulu 3, Hawaii. Rufus George Allen, c/o O. P. Soares, P. O. Box 2702, Honolulu 3, Hawaii.

Offense: Murder in the first degree.

Date of Judgment: April 4, 1944.

Brief Description of Judgment or Sentence: The defendant having been adjudged guilty of murder in the first degree, the sentence of death was imposed upon him.

Name of Prison Where Now Confined: Oahu Prison, Kamehameha Highway corner of Puuhale Road, Honolulu, Hawaii. [83]

I, the above named defendant, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

(Signed) TIMOTEO ANDRES

Appellant.

Dated: Honolulu, Hawaii, April 10, 1944.

## GROUNDS OF APPEAL

1. That the Grand Jury which returned the indictment in the above entitled action was not drawn in accordance with the provisions of the statutes in such cases made and provided.

2. That the jury originally drawn to try the above entitled cause was not drawn in accordance with the provisions of the statutes in such cases made and provided.

3. That the special venire drawn in the above entitled cause was not drawn in accordance with the provisions of the statutes in such cases made and provided.

4. That the defendant's motion for a directed verdict should have been granted on each of the following, among others, grounds: (a) that the evidence failed to show premeditation on the part of the defendant; (b) that the evidence failed to show any motive on the part of the defendant; (c) that the evidence failed to show that the alleged offense was committed on the land within the concurrent jurisdiction of the United States, and (d) that the above entitled court was without jurisdiction to try said cause for the reason, among others, that the Territory of Hawaii was, at the time the alleged commission of the alleged offense and at all times thereafter up to and including the date of judgment, under martial law.

5. That the Court should have granted defendant's motion for a new trial as also defendant's motion in arrest of judgment and to stay the im-



position of sentence on each and every of the grounds alleged in support of said several motions.

6. That the members of the jury had improperly before them during the course of the deliberation of the jury certain inflammatory and prejudicial photographs.

7. That the jury were improperly and erroneously instructed as to the law applicable to this case both as to the offense charged and as to the provisions of the statutes as to the finding of a verdict qualified so as to avoid the necessity of the defendant's receiving the death sentence in the event of conviction.

8. That there is no authority for inflicting the death penalty on the defendant in this case.

(Signed) TIMOTEO ANDRES

RUFUS GEORGE ALLEN

(S) M.C.U.

(S) O. P. SOARES

Attorneys for defendant.

[Endorsed]: Filed Apr. 10, 1944. [85]

[Title of District Court and Cause.]

**EXTENSION OF TIME WITHIN WHICH TO  
PERFECT APPEAL**

Good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that the defendant above named have -60- days further time within which to perfect his appeal to

the Ninth Circuit Court of Appeals in the above entitled cause.

Dated, at Honolulu, Hawaii, this 2nd day of May, 1944.

(S) J. FRANK McLAUGHLIN  
Judge United States District  
Court, District of Hawaii.

[Endorsed]: Filed May 2, 1944. [87]

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[Title of District Court and Cause.]

**DEFENDANT APPELLANT'S DESIGNATION  
OF RECORD**

The defendant-Appellant herein, Timoteo Mariano Andres, designates the following to be included in the record of appeal:

1. The indictment against the defendant.
2. The instructions of the Court to the Jury.
3. Exhibits Numbers three (3) and Eight (8).
4. Defendant's motion for a new trial.
5. Defendant's motion in arrest of judgment and to stay imposition of sentence.
6. The judgment, commitment and sentence of the Court.
7. Clerk's minutes of all the proceedings in the above entitled matter.

Dated at Honolulu, Hawaii, this 14th day of July, 1944.

**TIMOTEO MARIANO**

**ANDRES**

Defendant-Appellant,

(By) (S) O. P. SOARES

his attorney.

[Endorsed]: Filed Jul. 21, 1944. [89]

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[Title of District Court and Cause.]

**ASSIGNMENT OF ERRORS**

Comes now Timoteo Mariano Andres, defendant above named, and says that in the Decisions, Rulings, and Orders of the Honorable J. Frank McLaughlin in the above entitled matter in the District Court of the United States for the Territory of Hawaii and in the Judgment and Sentence entered in the above entitled matter and in the record and proceedings in the above entitled matter there are manifest, material and prejudicial error and said Timoteo Mariano Andres makes, files and presents the following Assignments of Error upon which he relies, to-wit:

**ASSIGNMENT OF ERROR NO. 1.**

The Court and the judge thereof erred in charging the jury as follows, to-wit: I instruct you that you may return a qualified verdict in this case by adding the words "without capital punishment" to

## ASSIGNMENT OF ERROR NO. 5.

The Court and the judge thereof erred in charging the jury as follows, to-wit: A reasonable doubt, gentlemen, is just such a doubt as the term implies. It is a doubt for which you can give a reason. It must not arise from any merciful disposition or kindly, sympathetic feeling or desire to avoid performing a possibly disagreeable duty; for that the power conferred upon juries by the statute to qualify a verdict of murder in the first degree was expressly granted to enable the jury to exercise a "merciful disposition or kindly, sympathetic feeling, or desire to avoid performing a possibly disagreeable duty" and to give effect to any or all of those matters. [93]

## ASSIGNMENT OF ERROR NO. 6.

The Court and the judge thereof erred in sending into the jury room for the scrutiny of the jurors Exhibits 3 and 8, being gruesome photographs of the partially naked, dead, and mutilated body of the person with the murder of whom defendant was accused, for that said photographs could at that time serve no purpose but to influence the minds of the jurors against the defendant.

## ASSIGNMENT OF ERROR NO. 7.

The Court and the judge thereof erred in denying defendant's motion in arrest of judgment, and to stay the imposition of sentence for that no means of inflicting the death penalty cases arising in the above entitled court is provided by law.

**ASSIGNMENT OF ERROR NO. 8.**

The Court and the judge thereof erred in sentencing the defendant to suffer the death penalty for that no means of inflicting the death penalty in cases arising in the above entitled court is provided by law.

**ASSIGNMENT OF ERROR NO. 9.**

The Court and the judge thereof erred in ruling that the above entitled court had jurisdiction to try the above entitled cause for that the Territory of Hawaii being under martial law, the civil courts, including the above entitled court, were without authority to function and the defendant should have been tried by the military authorities.

[94]

**ASSIGNMENT OF ERROR NO. 10.**

The Court and the judge thereof erred in denying defendant's motion for a new trial on each ground thereof for the reasons set out in Assignments of Error Nos. 1 to 8<sup>2</sup> respectively.

Dated at Honolulu, Hawaii, this the 26th day of July, 1944.

**TIMOTEO MARIANO  
ANDRES,**

Defendant,

(By) (S) O. P. SOARES  
his attorney.

[Endorsed]: Filed Jul. 26, 1944. [95]



[Title of District Court and Cause.]

**CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT OF RECORD  
ON APPEAL**

United States of America,  
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing pages numbered from 1 to 95 inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above entitled cause as the same remain of record and on file in my office; that the costs of the foregoing transcript of record on appeal are \$15.25, and that said amount has been paid to me by the appellant.

In Testimony Whereof, I have hereto set my hand and affixed the seal of said Court this 28th day of July, A. D. 1944.

[Seal] WM. F. THOMPSON, JR.

Clerk, U. S. District Court,  
Territory of Hawaii. [96]

[Endorsed]; No. 10815. United States Circuit Court of Appeals for the Ninth Circuit. Timoteo Mariano Andres, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon appeal from the District Court of the United States for the Territory of Hawaii.

Filed August 1, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

**No. 10815**

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**United States  
Circuit Court of Appeals**

**For the Ninth Circuit.**

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**TIMOTEO MARIANO ANDRES,**

**Appellant,**

**vs.**

**UNITED STATES OF AMERICA,**

**Appellee.**

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**SUPPLEMENTAL  
Transcript of Record**

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**Bill of Exceptions Upon Appeal from the District Court  
of the United States for the Territory of Hawaii.**

*United States of America*

69

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10815

**TIMOTEO MARIANO ANDRES,**

Appellant,

vs.

**UNITED STATES OF AMERICA,**

Appellee.

Upon Appeal from the District Court of the United  
States for the Territory of Hawaii.

Before: Garrecht, Mathews and Healy, Circuit  
Judges, Garrecht, C. J.

Timoteo Mariano Andres appeals from the judgment sentencing him to death on conviction of murder in the first degree. The assignment of errors charges error in instructions given to the jury and in the refusal to give other instructions.

Whether the lower court committed error in refusing to give requested instructions or in giving other instructions cannot be reviewed by this court in the absence of a proper bill of exceptions. Here there is no bill of exceptions whatever. Since the appellant's life is at stake, we feel the case should be remanded to the trial court for the settlement of a bill of exceptions, which should include the court's full charge to the jury, the objections and exceptions thereto, and the rulings made by the



your verdict. This power is conferred solely upon you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment; for that the Court should have prescribed [91] to the jury what the jury might take into consideration in qualifying its verdict with the words, "without capital punishment."

### ASSIGNMENT OF ERROR NO. 2.

The Court and the judge thereof erred in charging the jury as follows, to-wit: Gentlemen of the Jury you are instructed that before you may return a qualified verdict of murder in the first degree without capital punishment that your decision to do so must be unanimous: for that there is no requirement, statutory or otherwise, that the jury must be unanimous in giving effect to the statute which provides that a verdict of guilty of murder in the first degree may be qualified by the words, "without capital punishment."

### ASSIGNMENT OF ERROR NO. 3.

The Court and the judge thereof erred in charging the jury as follows: to-wit: In discharging your duty as jurors, you must not permit sympathy or passion or prejudice to affect your judgment, but you must determine this case within the narrow channel of right and justice, keeping in mind the charge, the testimony, the law and the facts of this case. If the proof convinces you beyond a reasonable doubt that the defendant is guilty



of the charge stated in the indictment, then your verdict must be "guilty"; for that the statute in providing that a verdict of guilty of murder in the first degree may be qualified by adding the words, "without capital punishment" intended that the jury might, if it so desired, show sympathy for the defendant; intended that the jury should not be confined to "the narrow channels of right and justice" as in cases not capital. [92]

#### ASSIGNMENT OF ERROR NO. 4.

The Court and the judge thereof erred in charging the jury as follows, to-wit: The indictment was found by the grand jury upon evidence presented to it by the Government alone, and created in the minds of the grand jury a belief that it was probable that a crime had been committed and that this defendant probably committed that crime.

Upon the evidence which it heard, the grand jury indicted this defendant, thereby indicating that it was probable that a crime had been committed, which should be disposed of in this court where both sides could be heard, and this is the state which we have now reached; for that the action of the grand jury in returning a verdict is not a matter with which the trial jury is concerned; the probabilities to which the charge of the court drew the attention of the trial jury should not have been presented to it; and the defendant was, therefore, deprived of his right to a fair and impartial trial.

court in connection with the instructions to the jury.

/s/ FRANCIS J. GARRECHT,

U. S. Circuit Judge.

CLIFTON MATHEWS,

U. S. Circuit Judge.

WILLIAM HEALY,

U. S. Circuit Judge.

Filed Feb. 25, 1946. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

### DEFENDANT'S BILL OF EXCEPTIONS

United States of America,  
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true, and correct copy of the original Defendant's Bill of Exceptions, in the matter of United States of America, plaintiff, vs. Timoteo Mariano Andres, Defendant, Criminal No. 9562, as the same remains of record and on file in the office of the Clerk of said Court.

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said District Court this 18th day of October, A. D. 1946.

[Seal] /s/ WM. F. THOMPSON, JR.,  
Clerk.

O. P. SOARES,  
1-2 Union Trust Building,  
Honolulu, Hawaii.  
Attorney for Defendant.

[Endorsed]: Filed Oct. 18, 1946.

In the United States District Court for the  
Territory of Hawaii

Criminal No. 9562

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TIMOTEO MARIANO ANDRES,

Defendant.

DEFENDANT'S BILL OF EXCEPTIONS

Be It Rememered that the above entitled cause came on duly to be heard in the above entitled Court on the 3rd day of March 1944, Honorable J. Frank McLaughlin, one of the judges of said Court presiding, for further trial, and the plaintiff being represented by Edward A. Towse, Esq., Assistant United States Attorney, and the defendant

being present in Court and represented by his Counsel, O. P. Soares, Esq., the following proceedings were had:

### EXCEPTION No. I.

At the close of the evidence and after the arguments of counsel were completed the Court instructed the jury as per United States Instruction No. 9 as follows: "I instruct you that you may return a qualified verdict in this case by adding the words 'without capital punishment' to your verdict. This power is conferred solely upon you and in this connect the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment."

Before the giving of such instruction and before the jury had retired to consider its verdict defendant objected to the giving of such instruction for that the Court should have prescribed to the jury what the jury might take into [1\*] consideration in qualify its verdict with the words, "without capital punishment." The Court overruled the objection.

An exception to the Court's said ruling and to the giving of said instruction was duly taken by the defendant in the presence of the jury and allowed by the Court.

### EXCEPTION No. II.

At the close of the evidence and after the argu-

\* Page numbering appearing at foot of page of original certified Transcript of Record.

ments of counsel were completed the Court instructed the jury as per United States Instruction No. 10 as follows: "Gentlemen of the Jury you are instructed that before you may return a qualified verdict of murder in the first degree without capital punishment that your decision to do so must be unanimous."

Before the giving of such instruction and before the jury had retired to consider its verdict defendant objected to the giving of such instruction for that there is no requirement, statutory or otherwise, that the jury must be unanimous in giving effect to the statute which provides that a verdict of guilty of murder in the first degree may be qualified by the words, "without capital punishment," and further that the law as adjudicated is that if the jurors do not agree and are not unanimous, and that some of them desire to qualify a verdict of guilty as permitted by the statute, the defendant cannot suffer the death penalty.

The Court overruled the objection. An exception to the Court's ruling and to the giving of said instruction was duly taken by the defendant in the presence of the jury and allowed by the Court.

### EXCEPTION No. III.

At the close of the evidence and after arguments of counsel were completed the Court of its own motion instructed [2] the jury as follows: "In discharging your duty as jurors, you must not permit sympathy or passion or prejudice to affect your



judgment, but you must determine this case within the narrow channel of right and justice, keeping in mind the charge, the testimony, the law and the facts of this case. If the proof convinces you beyond a reasonable doubt that the defendant is guilty of the charge stated in the indictment, then your verdict must be guilty."

Defendant was not advised of the Court's intention to give such instruction and had no opportunity to object to the giving of the same.

After verdict, and in due time, defendant made a motion for a new trial on the ground, among others that such instruction was improperly given and was not a correct statement of law for that how far considerations of human passion or of sympathy or any other consideration whatever should be allowed weight, against a verdict of guilty upon which the death penalty would have to be inflicted is committed to the jury alone.

The motion for a new trial was denied as to this and all of its grounds.

To the denial of his motion for a new trial defendant duly took an exception which exception was allowed by the Court.

#### P. EXCEPTION No. IV.

At the close of the evidence and after the arguments of counsel were completed the Court of its own motion instructed the jury as follows: "The indictment was found by the grand jury upon evi-

dence presented to it by the Government alone, and created in the minds of the grand jury a belief that it was probable that a crime had been committed and that this defendant probably committed that crime. [3]

"Upon the evidence which it heard, the grand jury indicted this defendant, thereby indicating that ~~it was probable that a crime had been committed,~~ which should be disposed of in this court where both sides could be heard."

Defendant was not advised of the Court's intention to give such instruction and had no opportunity to object to the giving of the same.

After verdict, and in due time, defendant made a motion for a new trial on the ground, among others, that such instruction was improperly given. To state to the trial jury that the grand jury, upon evidence presented to it, believed the defendant was guilty of the crime charged was to deprive defendant of his right to a fair and impartial trial.

The motion for a new trial was denied as to this and all of its grounds.

To the denial of his motion for a new trial defendant duly took an exception which exception was allowed by the Court.

#### EXCEPTION No. V.

At the close of the evidence and after the arguments of counsel were completed the Court of its own motion instructed the jury as follows: "A rea-

sonable doubt, gentlemen, is just such a doubt as the term implies. It is a doubt for which you can give a reason. It must not arise from any merciful disposition or kindly, sympathetic feeling or desire to avoid performing a possibly disagreeable duty."

Defendant was not advised of the Court's intention to give such instruction and had no opportunity to object to the giving of the same.

After verdict, and in due time, defendant made a motion for a new trial on the ground, among others, that such instruction [4] was improperly given and was not a correct statement of law for that how far clemency, sympathy, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light or any other consideration whatever should be allowed weight against a verdict of guilty upon which the death penalty would have to be inflicted is committed to the jury alone, which motion for a new trial was denied as to this and all of its grounds.

To the denial of his motion for a new trial defendant duly took an exception which exception was allowed by the Court.

#### EXCEPTION No. VI.

After verdict, and in due time, defendant made a motion for a new trial on the ground, among others, that the effect of said verdict is to require that defendant be sentenced to suffer the death penalty, whereas no means of inflicting the death penalty in

cases arising in the District Court of the United States for the Territory of Hawaii is provided by law.

Said motion for a new trial was denied as to this and all of its grounds.

To the denial of his motion for a new trial defendant duly took an exception which exception was allowed by the Court.

#### EXCEPTION No. VII.

After verdict, and in due time, defendant made a motion in arrest of judgment and to stay the imposition of sentence on the ground that the effect of said verdict is to require that defendant be sentenced to suffer the death penalty, whereas no means of inflicting the death penalty in cases arising in the District Court of the United States for the Territory of Hawaii is provided by law. [5]

Said motion in arrest of judgment and to stay the imposition of sentence was denied.

To the denial of his said motion in arrest of judgment and to stay the imposition of sentence defendant duly took an exception which exception was allowed by the Court.

#### EXCEPTION No. VIII.

After verdict, and in due time, defendant made a motion for a new trial as follows:

And now comes said defendant, Timoteo Mariano Andres, by O. P. Soares, his attorney, and moves



the court to vacate the verdict found by the jury in the above entitled action on the 3rd day of March, 1944, and to grant said defendant, Timoteo Mariano Andres, a new trial of this action, for the following causes which affect materially his substantial rights, to-wit:

I.

Irregularly in the proceedings of the court by which said defendant was prevented from having a fair trial, in this that certain gruesome photographs of the naked dead body of Carmen Gami Saguid purporting to show the wounds of which the said Carmen Gami Saguid died, which photographs could then serve no purpose but to inflame the minds of the jurors against the defendant, were sent into the jury room for the scrutiny of the jury, they, the jury, not having directly or indirectly requested the same;

II.

Said verdict is contrary to law, in this that the effect of said verdict is to require that the defendant be sentenced to suffer the death penalty, whereas no means of inflicting the death penalty in cases arising in this court is provided by law; [6]

III.

Because the Court erred in charging the jury as follows, to-wit:

I instruct you that you may return a qualified verdict in this case by adding the words "without capital punishment" to your verdict. This power is conferred solely upon you and in this connection



the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment.

Winston vs. U. S. 172 U. S. 303, 312;

**IV.**

Because the Court erred in charging the jury as follows, to-wit:

Gentlemen of the Jury you are instructed that before you may return a qualified verdict of murder in the first degree without capital punishment that your decision to do so must be unanimous.

Smith vs. U. S. (CCA 9th) 1931, 47 Fed. 2d 518;

**V.**

Because the Court erred in charging the jury as follows:

In discharging your duty as jurors, you must not permit sympathy or passion or prejudice to affect your judgment, but you must determine this case within the narrow channel of right and justice, keeping in mind the charge, the testimony, the law and the facts of this case. If the proof convinces you beyond a reasonable doubt that the defendant is guilty of the charge stated in the indictment, then your verdict must be, "guilty." (55)

**VI.**

Because the Court erred in charging the jury as follows:

The indictment was found by the grand jury upon evidence presented to it by the Government alone, and created in the [7] minds of the grand jury a belief that it was probable that a crime had been committed and that this defendant probably committed that crime.

Upon the evidence which it heard, the grand jury indicted this defendant, thereby indicating that it was probable that a crime had been committed, which should be disposed of in this court where both sides could be heard, and this is the stage which we have now reached.

#### VII.

Because the Court erred in charging the jury as follows:

A reasonable doubt, gentlemen, is just such a doubt as the term implies. It is a doubt for which you can give a reason. It must not arise from any merciful disposition or kindly, sympathetic feeling or desire to avoid performing a possibly disagreeable duty.

#### VIII.

Because the Court and the jury which rendered the verdict in the above entitled matter were without jurisdiction for that paragraph number 3.02 of General Orders No. 2 of the Military Governor of the Territory of Hawaii provides that charges involving major offenses shall be referred to a military commission for trial and determination, and it was not otherwise ordered by the Military Governor of the Territory of Hawaii either at the time

of the offense charged in the indictment returned in the above entitled matter, or up to the time of the verdict rendered in said matter, or at any time.

Said motion for a new trial was denied as to each of its grounds and to the denial of said motion defendant duly took an exception which exception was allowed by the Court. [8]

### EXCEPTION No. IX.

After verdict, and in due time, defendant made a motion in arrest of judgment and to stay imposition of sentence as follows:

And now comes said defendant, Timoteo Mariano Andres, by O. P. Soares, his attorney, after verdict of the jury which tried said cause, and before any judgment rendered thereon by the court, and moves the court to arrest the judgment in this cause and to stay the imposition of sentence on him, the said defendant, for the following reason:

That the effect of said verdict is to require that the defendant be sentenced to suffer the death penalty, whereas no means of inflicting the death penalty in cases arising in this court is provided by law.

Wherefore, and for the reasons aforesaid, the defendant prays that said judgment be arrested and imposition of sentence be stayed.

Said motion in arrest of judgment and to stay imposition of sentence was denied and to the denial

of said motion defendant duly took an exception which exception was allowed by the Court.

### EXCEPTION No. X.

Prior to drawing a jury to try this cause and before any evidence was adduced, defendant moved to strike out the entire jury panel upon the ground that the jurors called in this case were not representative of the body of the district for the reason that names drawn from outlying islands were set aside, the drawing being confined to the Island of Oahu.

This motion was denied by the Court to which denial defendant duly took exception, which exception was allowed by the Court. [9].

Thereafter a jury was drawn, the defendant, however, having first exhausted all his preemptory challenges of prospective jurors.

Further complying with the order of the United States Circuit Court of Appeals for the Ninth Circuit, the trial court's full charge to the jury is herein set forth, as follows:

Gentlemen of the Jury:

The testimony, the taking of evidence, has been concluded and the lawyers have made their arguments analyzing the testimony and given you their viewpoints upon the evidence and the issues of this case. They have also, in the course of their argument, stated to you what conclusions in their opinion should inevitably follow.



The lawyers and the jury and the judge have each their particular duties to perform in the trial of a criminal case. The lawyers for each side are required to present the testimony bearing upon the guilt or innocence of the party on trial. The duty of the judge is essentially to see that the trial is orderly conducted; that hearsay and immaterial matters are excluded, and to advise the jury upon the law which is applicable to the case.

The function of the jury is separate and distinct from that of the lawyers and the judge. It is the duty of the jury to find what the facts are from the evidence which has been presented. In doing this, the jury must also consider the credibility of the witnesses who have testified.

The lawyers have performed their part of the trial and I am now instructing you upon the law which is applicable and your duty as jurors to find the facts is now at hand. [10].

You are admonished to banish from your minds any prejudice which may be lurking there or any adverse sentiment with relation to the issues and to determine the case solely upon the facts presented to you within the issues of this case, and the law having relation to those facts.

In discharging your duty as jurors, you must not permit sympathy, or passion or prejudice to affect your judgment, but you must determine this case within the narrow channel of right and justice, keeping in mind the charge, the testimony, the law and the facts of this case. If the proof convinces



you beyond a reasonable doubt that the defendant is guilty of the charged stated in the indictment, then your verdict must be "guilty". If, on the other hand, you have a reasonable doubt as to the defendant's alleged guilt of the charge stated in the indictment, it is imperative that you enter your verdict of "not guilty."

You have satisfied both the Government and the defendant in this case that you have no prejudice or preconceived notions concerning the issues of this case, and that your minds are free from passion and prejudice, and that you can and will determine the issues solely upon the evidence and the law. Both sides have the right to rely upon this conception of your qualifications. I have no doubt but what you will eliminate from your minds every tendency to detract from the issues and that you will concentrate your thoughts upon the determination to do justice and right as your quickened conscience is aroused by the serious duty before you.

You can readily understand that any government can be maintained only by the enforcement of its laws. Neither you as the jury, nor I, as the judge, are concerned with the policies in back of the laws enacted by the Congress. This [11] is a government of laws and not of men. You will understand that if the Congress, our law-making body, believes it to be to the best interest and welfare of the United States to enact a particular law, and that if people decline or fail to live up to that law, and the

court—consisting of the judge and the jury—fails to function in the enforcement of that law, or any other law, that it will be only a short time until a condition of anarchy will prevail and no stable government can be maintained.

The Government, however, does not want an innocent man convicted. On the other hand, it does not want a guilty man to be set free when the testimony shows beyond a reasonable doubt that he is guilty. The Government is as much interested in having an innocent man acquitted as it is in having a guilty man convicted. However, it does not want a guilty man to escape the evidence shows beyond a reasonable doubt that he is guilty.

To the indictment which the grand jury returned against this defendant, this defendant entered a plea of not guilty. That is to say, he denied the charge stated in the indictment and placed himself upon his Country for the purpose of trial. The burden is upon the Government to show to your satisfaction, gentlemen, that this defendant is guilty beyond every reasonable doubt. This burden does not change at any time during the course of the trial. The defendant is presumed innocent of the charge stated in the indictment until he is proven guilty by the degree of proof to which I have previously referred. This presumption of innocence continues with the defendant throughout the trial until you are convinced by the evidence that he is guilty beyond every reasonable doubt.

When the indictment was returned by the grand

jury against this defendant, the defendant had had no opportunity to present [12] his side of the case. The indictment was found by the grand jury upon evidence presented to it by the Government alone, and created in the minds of the grand jury a belief that it was probable that a crime had been committed and that this defendant probably committed that crime.

Upon the evidence which it heard, the grand jury indicted this defendant, thereby indicating that it was probable that a crime had been committed, which should be disposed of in this court where both sides could be heard, and this is the stage which we have now reached.

I advise you, gentlemen, that it is the indictment in this case which frames the issues of the case.

I advise you that evidence is of at least two kinds; namely, direct and positive and circumstantial evidence. Positive evidence is the testimony of a person who heard something or saw something or said something or felt something; that is to say, something that can be readily perceived by the faculties. Circumstantial evidence is proof of such facts and circumstances surrounding a crime from which a jury may infer others and connected facts which usually or reasonably follow according to the common experience of mankind.

Circumstantial evidence is regular and competent in a criminal case, and when it is of such a character as to exclude every reasonable hypothesis except that the defendant is guilty, it is entitled to the same

weight as direct evidence. Circumstantial evidence in any sense would have to be considered by you in connection with other evidence produced. But, to be of value, the circumstances must be consistent with each other, consistent with the guilt of the party charged, inconsistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt. [13]

A reasonable doubt, gentlemen, is just such a doubt as the term implies. It is a doubt for which you can give a reason. It must not arise from any merciful disposition or kindly, sympathetic feeling or desire to avoid performing a possibly disagreeable duty. It must be a substantial doubt, such as an honest, sensible, fair-minded man might, with reason, entertain consistently with a conscientious desire to ascertain the truth and to perform a duty. It is such a doubt as would cause a man of ordinary prudence, sensibility and decision, in determining an issue of great concern to himself, to pause or hesitate in arriving at his conclusion. It is a doubt which is created by the want of evidence or maybe by the evidence itself. It is not, however, a speculative imaginary or conjectural doubt.

It is not incumbent upon the Government in the trial of a criminal case to prove the defendant guilty beyond all possibility of doubt because that would be impossible. A juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the party charged.

If I have referred to any fact in the case, it has



not been done to intimate to you any opinion which I have of the fact, although I would have a right to do that under the law. However, it is not my purpose to invade the province of the jury. It is your duty to find the facts of this case. You, the jury, are the sole and exclusive judges of the facts in this case and of the credibility of the witnesses. If you have any idea that I have any opinion about this case as to the guilt or innocence of this defendant, I want you to disregard it. I want you to arrive at your own independent conclusion from the evidence which has been presented and all the circumstances detailed by the witnesses. [14]

Now, gentlemen, there are certain specific instructions which I have been requested by the attorneys to give you. These instructions follow.

#### UNITED STATES INSTRUCTION No. 1

Gentlemen of the Jury; I charge you that the defendant, Timoteo Mariano Andres, stands charged with murder in the first degree. In this regard you are instructed that murder is in two degree, first and second. The degrees are defined as follows:

“Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death



of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

### UNITED STATES INSTRUCTION No. 2

You are instructed that it is an axiom of the law that every sane man is presumed to intend the ordinary, natural, or necessary consequences of his voluntary act. In the absence of evidence to the contrary, he who takes the life of another by the infliction of a wound, or by some other means calculated to produce death, is presumed to have intended that result. From the circumstances of the taking of the life of a human being by an act of a nature naturally and probably calculated to cause death, the law presumes that he who perpetrated the act foresaw and intended the result which followed, in the absence of evidence showing that the homicide was justifiable [15] or excusable, or of evidence sufficiently rebutting the presumption of intent to take a human life. Premeditation may be inferred from the circumstances of the case.

### DEFENDANT'S INSTRUCTION No. 16

I instruct you, gentlemen of the jury, that an act is done wilfully when done intentionally and on purpose. By premeditation, however, is meant "thinking out before hand," when one thinks over doing an act, and then determines or concludes to do it, he has premeditated the act. Malice, in the ordinary sense, means ill-will or hatred toward an-

other; but in its legal sense it signifies a wrong act done without just cause or excuse.

Before you can convict the defendant of murder in the first degree, it is necessary for the prosecution to show from the evidence beyond a reasonable doubt, that the defendant, prior to the time of the killing formed the purpose or design to kill Carmen Gami Saguid. It is not necessary for such fixed design to be formed any definite time before the killing, but, if found at the time of the killing it would not be sufficient to make an act murder in the first degree, for it is essential, to constitute murder in the first degree, that the fixed purpose or design to kill should have been formed at some time before the killing.

#### UNITED STATES INSTRUCTION No. 3

You are instructed that murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, with malice aforethought, either expressed or implied. The term "malice" means that the homicide or killing was the result of a form designed, based upon a wicked and depraved spirit, and is maliciously conceived and wickedly and maliciously executed without justifiable or lawful excuse. [16]

#### UNITED STATES INSTRUCTION No. 4

You are further instructed that the state of mind of the accused at the time of the alleged homicidal act is the factor in the determination of whether the homicide is murder in the first degree. First

degree murder is distinguished from other grades of homicide primarily by the mental element known as "malice aforethought" the unique characteristic of which is deliberation or premeditation—a specific intent to take a life.

Evidence if any exists of hostility, quarrels, the utterance of threats, measures taken in preparation and the manner of killing may be considered by you in determining the presence or absence of express malice.

#### DEFENDANT'S INSTRUCTION No. 18

I instruct you, gentlemen of the jury, that the term "wilfully," as used in the indictment means intentionally; that is, not accidentally. "Deliberate" means in a cool state of mind, not a sudden passion engendered by a lawful or just cause or provocation. "Malice" means done intentionally, without just cause or other legal excuse. "Malice aforethought" means done with malice and premeditation. "Premeditated" means thought of before hand for any length of time, however short.

#### UNITED STATES INSTRUCTION No. 5

Gentlemen of the Jury, you are instructed that: Evidence if any that shows deliberation, anything that shows a premeditated purpose to do a wicked or wilful act that might result in death, is evidence that may be considered by the jury as evidence of malice, and of the existence of malice aforethought. [17]

**DEFENDANT'S INSTRUCTION No. 19**

In instruct you, gentlemen of the jury, that even though you believe from the evidence beyond all reasonable doubt that the defendant killed Carmen Gami Saguid, still if you do not believe that he premeditated the killing, that is, thought it out before hand, you must find the defendant not guilty of the crime of murder in 1st degree.

So too, if you have a reasonable doubt on the question of whether the defendant premeditated the killing, that is thought it out before hand, you must find him not guilty of the crime of murder in the 1st degree.

**DEFENDANT'S INSTRUCTION No. 20**

I instruct you, gentlemen of the jury, that even if you believe from the evidence beyond a reasonable doubt that the defendant stabbed Carmen Gami Saguid, but you further believe the evidence, or have a reasonable doubt on the point that at the time of the stabbing defendant was in a violent passion and while under said violent passion he did stab and kill the said Carmen Gami Saguid, then you cannot find the defendant guilty of murder in 1st degree.

**UNITED STATES INSTRUCTION No. 7**

I instruct you that evidence of previous difficulties and threats made by the accused to the deceased may be considered by you even though they may be of a general and indefinite nature, and their



weight or probative force is a question solely within your province to determine. In this connection, remoteness in point of time prior to the homicide may be considered by you merely as bearing upon the weight which you give to the testimony. [18]

**DEFENDANT'S INSTRUCTION No. 17**

I instruct you, gentlemen of the jury, that when the evidence fails to show any motive to commit the crime charged this is a circumstance in favor of the defendant; and, in this case, if you find, upon a careful consideration of all the evidence, that it fails to show any motive on the part of the defendant to commit the crime charged against him, then his is a circumstance which you must consider, in connection with all the evidence, in arriving at your verdict.

**DEFENDANT'S INSTRUCTION No. 10**

I instruct you, gentlemen of the jury, that the indictment in this case contains merely the formal statement of the charge against the defendant and is not to be taken as any evidence of defendant's guilt. The plea of "not guilty" of the defendant puts in issue every material allegation of the indictment and is as effective a denial of the prosecution's accusations against him as if he had taken the stand and denied each statement of the government's witnesses categorically.

**DEFENDANT'S INSTRUCTION No. 2**

The indictment in this case is in no sense evidence



or proof that the defendant has committed the alleged crime. It is merely a formal allegation, required by law, alleging that the crime was committed in the form and manner therein set forth. No juror should suffer himself to be influenced in any degree whatsoever by the fact that this indictment has been returned against the defendant.

### INSTRUCTION No. 3

The defendant in a criminal case need not take the witness stand or offer any evidence in his behalf. Nor can you take into consideration in arriving at your verdict any reason or [19] motive which may have actuated him in not offering a defense on his own behalf.

### DEFENDANT'S INSTRUCTION No. 4

The presumption of innocence is not a mere form to be disregarded by you at pleasure, but it is an essential, substantial part of the law of the land, and binding upon you and it is your duty to give the defendant the full benefit of this presumption of innocence and to find him not guilty unless the evidence satisfies you of his guilt beyond all reasonable doubt.

### DEFENDANT'S INSTRUCTION No. 8

I instruct you, gentlemen of the jury, that the defendant is presumed to be innocent of the offense charged against him, and you must find him not guilty, unless you are satisfied of his guilt beyond every reasonable doubt. This is not a mere technical

rule to be lightly considered by you, but is a humane provision of the law to which you must give due regard, and if the evidence leaves a reasonable doubt in your mind as to the guilt of the defendant, or as to any material allegation of the indictment you are bound by the provisions of law and by your oaths, to find the defendant not guilty.

**DEFENDANT'S INSTRUCTION No. 5**

You are instructed that in a criminal case the burden of proof as characterized in these instructions, ever shifts to the defendant, but remains upon the United States of America throughout the case to prove the guilt of the defendant beyond all reasonable doubt. This burden does not under any circumstance, shift to the defendant to prove his innocence.

**DEFENDANT'S INSTRUCTION No. 6**

Under the law no jury should convict a person charged with crime upon mere suspicion, however strong, or simply because [20] there is a preponderance of all the evidence in the case against him, or simply because there are strong reasons to suspect him guilty. What the law requires before the defendant can be convicted of crime is not suspicion, not mere probabilities, but proof of his guilt beyond all reasonable doubt.

**DEFENDANT'S INSTRUCTION No. 7**

I further instruct you, that it is in nowise incumbent upon the defendant to explain away the

evidence offered by any of the witnesses on behalf of the government, nor to produce.

### DEFENDANT'S INSTRUCTION No. 15

I instruct you, gentlemen of the jury, that you cannot convict the defendant of murder unless the government has established the truth of each and every material allegation of the indictment to your satisfaction and beyond all reasonable doubt. The material allegations of the indictment are:

1. That the defendant
2. At the Civilian Housing Area No. 3, Pearl Harbor, Island of Oahu
3. Said Civilian Housing Area being on lands reserved or acquired for the use of the United States of America and under the concurrent jurisdiction thereof, within the District of Hawaii, and within the jurisdiction of this court;
4. did unlawfully, wilfully, and feloniously
5. with deliberate premeditated malicious design
6. with malicious aforethought
7. kill Carmen Gami Saguid
8. By stabbing and inflicting mortal wounds upon the body of Carmen Gami Saguid
9. Thereby perpetrating the crime of murder.

### UNITED STATES INSTRUCTION No. 9

I instruct you that you may return a qualified

verdict in this case by adding the words "without capital punishment" to your verdict. This power is conferred solely upon you and in this connection the Court cannot extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment.

**DEFENDANT'S INSTRUCTION No. 22**

I instruct you, gentlemen of the jury, that even if you should unanimously agree from the evidence beyond all reasonable doubt that the defendant is guilty as charged, you may qualify your verdict by adding thereto "without capital punishment" in which case the defendant shall not suffer the death penalty.

In this connection, I further instruct you that you are authorized to add to your verdict the words "without capital punishment;" and this you may do no matter what the evidence may be and without regard to the existence of mitigating circumstances.

**INSTRUCTION No. 10**

Gentlemen of the Jury you are instructed that before you may return a qualified verdict of murder in the first degree without capital punishment that your decision to do so must be unanimous.

**DEFENDANT'S INSTRUCTION No. 14**

The unanimous agreement of the jury is necessary to a verdict. This is in nowise to be considered



by you as a justification for abandoning your individual convictions or beliefs or doubts. While a unanimous verdict is required it must be arrived at by each juror's voting as he believes the law and the [22] evidence justifies him to vote. While, of course, each of you must give due regard to the opinions of the others, you are not required to substitute the opinion of a fellow juror for your own simply for the purpose of arriving at a unanimous verdict.

To illustrate, if after full and fair deliberation, one or more of you believe from the law and the evidence that the guilt of the defendant is established so clearly and convincingly as to leave no reasonable doubt in you minds, you are not to vote "not guilty" merely because a majority of the jury does not believe the defendant guilty or has a reasonable doubt of his guilt. So, too, if one or more of you, after a fair and impartial discussion with your fellow jurors, are not convinced from the evidence and the law beyond a reasonable doubt that defendant has been proved to be guilty of the crime charged, you are not to vote "guilty" merely because a majority votes that way. The "unanimous" verdict of the jury must be the sum total of your individual beliefs and is not to be arrived at by an arrangement of mere compromise, as for instance, finding the defendant guilty of a lesser offense than the crime charged, unless you are in unanimous agreement that all the elements of a lesser offense have been proved beyond a reasonable doubt.



UNITED STATES INSTRUCTION No. 11

Gentlemen of the Jury, I instruct you that you may find any one of the following verdicts, as the evidence and the circumstances in the evidence, in accordance with these instructions, may warrant:

(1) That the defendant is guilty of murder in the first degree.

(2) That the defendant is guilty of murder in the first degree without capital punishment. [23]

(3) That the defendant is guilty of murder in the second degree.

(4) That the defendant is not guilty.

(At 3:45 o'clock, p.m., the jury returned to the courtroom, and the following occurred:)

The Court: Note the presence of the jury and the defendant together with his attorney. I am advised by the bailiff that the jury wishes to ask the Court a question. Which gentlemen is the foreman—you, Mr. Ham? You are Mr. Ham?

The Foreman: Ham. The members of the jury would like to know if a verdict of guilty in the first degree was brought in, whether it would be mandatory on the part of the Judge to sentence the man to death, or hanging, or use his own discretion.

The Court: Just a minute. I want to be right in my answer. You may sit down. Will the counsel come to the bench, please? (Discussion off the record.)

The Court: Gentlemen of the Jury, the statute, as I recall, answers that question, but I wanted to look at it once again before I gave you a positive answer. The answer to the question is that, in the absence of a qualified verdict, if the verdict is guilty of murder in the first degree, the Court has no discretion, for the statute provides in such event that the person so convicted of such an offense—murder in the first degree—shall suffer the punishment of death. As I told you in your instructions, there is another Federal statute which enables you gentlemen to qualify your verdict and to add, in the event you should find the person guilty of murder in the first degree, to add to that verdict, I repeat, the phrase [24] “without capital punishment.” In that event the man, of course, under the statute so convicted would not suffer the punishment of death but it would life imprisonment, as I recall it under the statute.

Does that answer your question?

The Foreman: Yes.

The Court: Don't discuss your problems here, but if it is an answer to your question, you gentlemen can retire to your jury room if there are no other questions.

The Foreman: No other.

The Court: Counsel have asked me to reread the instructions to you on that particular point as an amplification of my answer to your question. Will you bear with me just a moment until I find that instruction? I will reread one or two instructions to you which bear on the question which you have asked:

"You may return a qualified verdict in this case by adding the words "without capital punishment" to your verdict. This power is conferred solely upon you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment."

"Even if you should unanimously agree from the evidence beyond all reasonable doubt that the defendant is guilty as charged, you may, as I have said, qualify your verdict by adding thereto "without capital punishment," in which case the defendant shall not suffer the death penalty."

"In this connection, I further instruct you that you are authorized to add to your verdict the words 'without capital punishment,' and this you may do, no matter what the evidence may be and without regard to the existence of mitigating circumstances." [25]

And, finally, you will recall I said that you are instructed, that before you may return a qualified verdict of murder in the first degree without capital punishment, that your decision to do so must, like your regular verdict, be unanimous.

Now, therefore, defendant by his counsel having tendered this his bill of exceptions and having prayed that the same may be signed and sealed by this court and made a part of the record thereof, I, J. Frank McLaughlin, judge of the above entitled court who presided at the trial of this cause, after due notice being given to the plaintiff in said cause,

have settled and signed said bill of exceptions and ordered that the same be made a part of the record of this cause, this 18th day of October, 1946.

[Seal]     /s/ J. FRANK McLAUGHLIN,  
Judge of the United States District Court for the  
Territory of Hawaii. [26]

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[Endorsed]: No. 10815. United States Circuit Court of Appeals for the Ninth Circuit. Timoteo Mariano Andres, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. (Bill of Exceptions) Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed October 21. 1946.

       /s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

**No. 10815**

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IN THE

**United States Circuit Court of Appeals  
For the Ninth Circuit**

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**TIMOTEO MARIANO ANDRES,**

**Appellant,**

**vs.**

**UNITED STATES OF AMERICA,**

**Appellee.**

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**Upon Appeal from the District Court of the United States  
for the Territory of Hawaii**

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**PROCEEDINGS HAD IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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United States Circuit Court of Appeals for the  
Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Friday, June 20,  
1947.

Before: Garrecht, Mathews and Healy,  
Circuit Judges.

**ORDER OF SUBMISSION**

Ordered appeal herein argued by Mr. O. P. Soares, counsel for appellant, and by Mr. Robert B. McMillan, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals for the  
Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Thursday, August  
14, 1947.

Before: Garrecht, Mathews and Healy,  
Circuit Judges.

**ORDER DIRECTING FILING OF OPINION  
AND FILING AND RECORDING OF  
JUDGMENT**

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10,815

Aug. 14, 1947

**TIMOTEO MARIANO ANDRES,**

**Appellant,**

**vs.**

**UNITED STATES OF AMERICA,**

**Appellee.**

Upon Appeal from the District Court of the United  
States for the Territory of Hawaii

Before: Garrecht, Mathews, and Healy,  
Circuit Judges.

Healy, Circuit Judge.

### OPINION

This appeal involves a statute of the United States, Criminal Code § 330, 18 USCA § 567, providing, so far as pertinent, that in all cases where an accused is found guilty of the crime of murder in the first degree "the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life."<sup>1</sup>

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<sup>1</sup>The statute was enacted in 1897, 29 Stat. 487.

On the trial appellant was convicted of first degree murder. The jury's verdict was not qualified, and the accused was given the death sentence in conformity with § 275 of the Criminal Code, 18 USCA § 454, providing that every person guilty of such offense shall suffer death. Errors are assigned in respect of certain of the court's instructions. While no exceptions were taken below or objections made to these instructions, the gravity of the case is such that the assignments ought nevertheless be considered.

The court charged the jury that they might return a qualified verdict by adding the words "without capital punishment," in which event the accused would not suffer death; that the power so to qualify was conferred solely upon them and that the court could not prescribe any rule defining its exercise, the entire matter in this respect being committed to their judgment; that even though they were in unanimous agreement beyond a reasonable doubt of the defendant's guilt as charged they might add the qualification; and, finally, that they might so qualify the verdict no matter what the evidence was and without regard to the existence of mitigating circumstances.

The complaint in respect of these instructions is bottomed on *Winston v. United States*, 172 U. S. 303, the argument being that the court should have included in the charge the verbiage of the opinion of the Supreme Court in the *Winston* case in a passage discussing the broad power conferred by the

statute upon the jury.<sup>2</sup> However, it is evident from a reading of the excerpt that the Court did not intend to hold that its comments were necessary or appropriate matter to include in an instruction. The contrary is intimated. The actual holding is that the court is without authority to prescribe rules for the jury defining or circumscribing their exercise of the right conferred; and the error found in the three cases under review was, not that the trial courts had said too little, but that they had said too

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<sup>2</sup>The passage in *Winston v. United States* (172 U. S. 303, 312-313), is as follows:

“The right to qualify a verdict of guilty, by adding the words ‘without capital punishment,’ is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone.”

much. We are satisfied that the instructions, in this instance, adequately advised the jury of their unlimited right to extend clemency for any reason that might appeal to them.

A related claim of error grows out of an admonition given the jury that they must not permit sympathy, or passion or prejudice to affect their judgment, but must determine the case within the narrow channel of right and justice, keeping in mind the charge, the testimony and the law. The argument is that under the holding in *Winston v. United States*, *supra*, sympathy may properly sway the jury in the exercise of their power to qualify, and that the instruction had the effect of unduly narrowing the grounds upon which a qualified verdict might be returned. We do not agree. The admonition was given in what may be termed the prologue to the instructions. This introductory matter dealt in general terms with the differing functions of the judge, counsel and the jury in the trial of the case. A study of these introductory remarks persuades us that the instruction complained of could hardly have been understood otherwise than as having reference to the duty of the jury in arriving at their decision on the primary question before them, namely, whether the accused was guilty of the crime charged. It was not until much later in the charge that the court commented on the power to qualify the verdict, and its comments on the subject could leave the jury in no doubt that relief from the death penalty was a matter committed without limitation to their discretion.



A later incident in the trial confirms the justice of this view. After the jury had been sent out they returned to inquire whether, in the event of a verdict of first degree murder, it would be mandatory on the judge to sentence the accused to death, or whether the judge might use his own discretion. The reply was that in the absence of a qualified verdict the death sentence must of necessity be imposed. The court then read once more to the jury its instructions concerning their power to qualify the verdict, thus stressing at a crucial moment the unfettered nature of the right.

A third instruction bearing on the statutory power was that before the jury may return a qualified verdict of first degree murder without capital punishment their decision to do so must be unanimous. This instruction is attacked on the ground that there is no statutory or other authority for it.

The instruction presents the one difficult problem in the case—not because we believe the ground on which it is assailed may be well taken, but for a different reason. The charge is clearly correct so far as it goes. As is generally recognized in the federal system, and as this court observed in *Smith v. United States*, 47 F. 2d 518, 520, unanimity in a verdict, unless otherwise provided by statute, is one of the incidents and essentials of a jury trial. The requirement of unanimity extends to whatever verdict the jury may return—not to a portion of it only, but to all of it. Such was the holding in *Smith v. United States*, *supra*. We turn for a moment to the *Smith* decision.

In that case the jury, after submission of the matter, returned with a request for further instructions on the subject of the qualification of their verdict. One of the jurors inquired what the result would be if they were unable to agree upon the qualifying words, and the court replied that if they agreed on a verdict of guilty, but could not agree upon the qualifying words, the verdict would stand as guilty without qualification. Commenting on this charge, the court said, one judge dissenting, that in a criminal case the requirement of unanimity extends not alone to the question of guilt or innocence and to the degree of the crime where different degrees are prescribed, but to the kind or character of the punishment where that is left to the jury's determination. "The discretion of the jury," said the court, "is unlimited and unrestricted, and if, in the opinion of one or more of the jurors, it would not be just or wise to impose capital punishment, he, or they, are under no legal obligation to join in a verdict without qualification so long as that opinion remains, and an instruction from the court that such is their duty is erroneous, and, of course, prejudicial."

While it was suggested, on oral argument, that the opinion of the dissenting judge in the Smith case presents the better view, we see no reason to depart from the majority holding. The stand taken is not only the humane construction of the statute; it appeals to us as an interpretation more in harmony with the traditional spirit of the jury system,

and with the legislative purpose as well. Cf. *Winston v. United States*, supra. It follows that the instruction given here, while correct so far as it went, did not completely expound the applicable law. A full exposition would have included the charge that before the jury may return a verdict of first degree murder without qualification, their decision to do so must in like manner be unanimous.

The problem posed by the record is whether it may fairly be thought that the jury were misled, that is, whether, because they were told only that they must be unanimous in returning a qualified verdict, they might have inferred that a like unanimity was not essential to the return of an unqualified one so long as they were in agreement on the main question of the defendant's guilt as charged in the indictment. We have studied the instructions to see whether, as a whole, they afford adequate ground for such an inference. We think they do not; hence, on this phase, we have concluded that a reversal would not be justified. Jurors ordinarily understand, without being told, that they are under no legal compulsion to join in a verdict with which they are in disagreement, either in whole or in part; and unless they are instructed to the contrary, as they were in *Smith v. United States*, supra, they may be relied upon to adhere to the common understanding of their ancient prerogative. But we do not rest our conclusion on that understanding alone. Following immediately upon the giving of the instruction in question was a flat charge that "the unanimous

agreement of the jury is necessary to a verdict," and that "while a unanimous verdict is required it must be arrived at by each juror's voting as he believes the law and the evidence justifies him in voting." Although this admonition was couched in general terms, we are satisfied that it served to dispel any uncertainty that the immediately preceding charge might have engendered.

The final claim of error hardly justifies notice. It relates to a charge stating that the indictment was found by the grand jury on evidence "presented by the government alone" of such nature as to create in the minds of the grand jury a belief that a crime had probably been committed and that the defendant had probably committed it. In other instructions on the subject, several of which were given at appellant's request, the court fully developed the proposition that the indictment was not to be taken in any sense as evidence of guilt, but was a mere accusation serving the formal purpose of framing the issues. The instructions on this matter tended, as they were designed to do, to protect the cause of the accused.

The judgment is affirmed.

[Endorsed]: Opinion. Filed Aug. 14, 1947. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10815

TIMOTEO MARIANO ANDRES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Territory of Hawaii and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered August 14, 1947.



United States Circuit Court of Appeals  
for the Ninth Circuit

[Title of Cause.]

Excerpt from Proceedings of Wednesday, October 8, 1947.

Before: Garrecht, Mathews and Healy,  
Circuit Judges.

ORDER DENYING PETITION FOR  
REHEARING

Upon consideration thereof, and by direction of the court, It Is Ordered that the petition of appellant, filed September 12, 1947, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

United States Circuit Court of Appeals  
for the Ninth Circuit

[Title of Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT, TO RECORD CERTIFIED UN-  
DER RULE 38 OF THE REVISED RULES  
OF THE SUPREME COURT OF THE  
UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred fifteen (115) pages, numbered from and including 1 to and including 115, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 14th day of October, 1947.

[Seal]

PAUL P. O'BRIEN,  
Clerk.

## SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 22, 1947

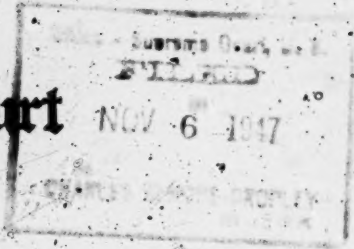
The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4156)

FILE COPY

**In the Supreme Court**

OF THE  
**United States**



OCTOBER TERM, 1947

No. 431

TIMOTEO MARIANO ANDRES,

*Petitioner,*

VS.

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI**  
**to the United States Circuit Court of Appeals**  
**for the Ninth Circuit.**

O. P. SOARES,

Union Trust Building, Honolulu 3, Hawaii,

*Counsel for Petitioner.*

HERBERT CHAMBERLIN,

Russ Building, San Francisco 4, California,

*Of Counsel.*

the judgment of the District Court of the United States for the Territory of Hawaii. R. 114. A petition for rehearing was denied October 8, 1947. R. 115.

#### **OPINIONS BELOW.**

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals is contained in the record. R. 106-114.

#### **JURISDICTION.**

Jurisdiction of this court is invoked under section 240 of the Judicial Code, 28 U.S.C.A., sec. 347 (a).

#### **SUMMARY STATEMENT OF THE MATTER INVOLVED.**

In the District Court the petitioner was indicted and found guilty of the crime of murder in the first degree. R. 5, 32. The jury did not qualify their verdict by adding thereto "without capital punishment". R. 32. The judgment of the District Court sentenced petitioner "to be hanged by the neck until dead". R. 32. He will be "hanged by the neck until dead" unless this honorable court intervenes.

At the trial, these instructions were given to the jury:

"In discharging your duty as jurors, you must not permit sympathy or passion or prejudice to affect your judgment, but you must determine



this case within the narrow channel of right and justice, keeping in mind the charge, the testimony, the law and the facts of this case." R. 7, 83.

"I have no doubt but what you will eliminate from your minds every tendency to detract from the issues \* \* \*. R. 8, 84.

"The indictment was found by the grand jury upon evidence presented to it by the Government alone, and created in the minds of the grand jury a belief that it was probable that a crime had been committed and that this defendant probably committed that crime." R. 9, 10, 86.

"Upon the evidence which it heard, the grand jury indicted this defendant, thereby indicating that it was probable that a crime had been committed, which should be disposed of in this court where both sides could be heard, and this is the stage which we have now reached." R. 10, 86.

"I want you to arrive at your own independent conclusion from the evidence which has been presented and all the circumstances detailed by the witnesses." R. 12, 88.

"I instruct you that you may return a qualified verdict in this case by adding the words 'without capital punishment' to your verdict. This power is conferred upon you and in this connection this Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment." R. 24, 96-97.

"I instruct you, gentlemen of the jury that even if you should unanimously agree from the evidence beyond all reasonable doubt that the defendant is guilty as charged; you may qualify

your verdict by adding thereto 'without capital punishment' in which case the defendant shall not suffer the death penalty. In this connection, I further instruct you that you are authorized to add to your verdict the words 'without capital punishment,' and this you may do no matter what the evidence may be and without regard to the existence of mitigating circumstances." Defendant's Instruction. R. 24, 97.

"Gentlemen of the Jury you are instructed that before you may return a qualified verdict of murder in the first degree without capital punishment that your decision to do so must be unanimous." R. 25, 97.

"Gentlemen of the Jury, I instruct you that you may find any one of the following verdicts, as the evidence and the circumstances in the evidence, in accordance with these instructions, may warrant:

(1) That the defendant is guilty of murder in the first degree.

(2) That the defendant is guilty of murder in the first degree without capital punishment.

(3) That the defendant is guilty of murder in the second degree.

(4) That the defendant is not guilty." R. 26, 99.

The jury interrupted its deliberations to return to court and ask, "The members of the jury would like to know if a verdict of guilty in the first degree was brought in, whether it would be mandatory on the part of the Judge to sentence the man to death, or hanging,

or use his own discretion". R. 99. The court replied, "The answer to the question is that, in the absence of a qualified verdict, if the verdict is guilty of murder in the first degree, the Court has no discretion, for the statute provides in such event that the person so convicted of such an offense—murder in the first degree—shall suffer the punishment of death". R. 100. Specific instructions on the subject were then repeated. R. 101. The jury retired and the verdict they returned was not qualified. R. 32. Judgment followed sentencing petitioner to death by hanging in the Territory of Hawaii. R. 37-38.

On his appeal to the Circuit Court of Appeals the petitioner challenged the instructions respecting qualified verdict. R. 61-63. He challenged the instructions respecting the indictment and intimations or inferences therefrom. R. 63. And he challenged the power of the District Court to impose the death penalty in the Territory of Hawaii. R. 64-65.

The Circuit Court of Appeals affirmed the judgment. R. 114. It ruled adversely to the petitioner on the first of these challenges. With reference to the decision of this court in *Winston v. United States*, 172 U. S. 303, 19 S. Ct. 212, 43 L. Ed. 456, and the discretion of a jury to qualify their verdict in a capital case, it ruled that "The actual holding is that the court is without authority to prescribe rules for the jury defining or circumscribing their exercise of the right conferred". R. 108. It ruled such discretion had not been invaded or impaired by instructions challenged by petitioner. R. 109. And it upheld the in-